EXHIBIT F

RE

SEP 08 1997

COMMISSION ON STATE MANDATES

OFFICE OF
LABOR RELATIONS

CITY OF SACRAMENTO
CALIFORNIA

921 10TH STREET
ROOM 601
SACRAMENTO, CA
95814-2711

PH 916-264-5424
FAX 916-264-8110

September 5, 1997

Paula Higashi
Executive Director
Commission on State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814

RE: CSM - 4499 Police Officer Bill of Rights

Dear Ms. Higashi,

The following information is submitted in order to clarify our earlier filed test claim and pursuant to our meeting subsequent to that filing.

In POBR, beginning with Section 3303. Investigations and interrogations; conduct; conditions; representation; reassignment, the section clearly indicates action which occurs before any act which would trigger rights under *Skelly.* Eligible employees are covered by this section even if discipline does not occur at some future date. As the entry paragraph to that section states:

> When any public safety officer is under investigation and subjected to interrogation...that could lead to punitive action, the interrogation shall be conducted under the following conditions. For the purposes of this chapter, punitive action means any action *that may lead to* dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for the purposes of punishment. (emphasis added)

Clearly, the investigation and interrogation precede the punitive action listed by the underlined "that may lead to." Additionally, rights under *Skelly* would not be applicable to a written reprimand or transfer. However, if a transfer from some type of special assignment occurs such as SWAT, Field Training Officer, Motor Officer, or other assignment such as Night Shift which pays a premium pay, the employer is required under this section to prove that the transfer was not made for the purposes of punishment. If an employee asserts the transfer is a form of punishment, such assertion could lead to a hearing otherwise not provided or available under *Skelly.* Further, paragraph (a) of Section 3303 places further restrictions on an employer which increase costs to an employer.

Paragraph (a) places restrictions on when an employee is interviewed. It requires that an employee be interviewed "at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer... ." If a typical police department works three shifts, such as the Police Department for this City, two-thirds of the police force work hours not consistent with the work hours of Investigators in the Internal Affairs section. Even in a smaller department without such a section, hours conflict if command staff assigned to investigate work a shift different than the employee(s) investigated. Payment of overtime occurs to the employee(s) investigated or those performing the required investigation, or is at least a potential risk to an employer for the time an employee is interrogated pursuant to this section. This section alone creates an increase in costs to a public employer.

The following are several examples of situations where employees are afforded rights under POBR which, under *Skelly* would not apply:

1. Interrogation or interview.

2. Reduction in salary for transfer from special assignment where pay is decreased.

3. Written reprimand.

4. Transfer, even with no pay reduction, for the purposes of punishment.

5. Denial of promotion on grounds other than merit.

6. Minor suspensions (5, possibly 10 days, or less).

7. Release from probation.

In the above, costs would be associated with clerical and professional time to schedule and provide an administrative hearing or an interview or interrogation.

Not covered by *Skelly* are the internal pieces of an interrogation or interview related to a public safety officer in paragraphs (g), and (l) of Section 3303, where costs can be attached. These internal pieces occur even if the investigation or interrogation does not result in discipline.

Purchase of taping equipment and additional blank tapes.

Additional professional time required in order to accomplish taping. A clear record of the interview or interrogation is necessary if further action occurs.

Clerical time involved in transcribing the taped interview or interrogation, providing a copy of the tape to the employee and to provide copies of any notes, related reports and complaints pursuant to Section 3303.

Additional professional and clerical time in scheduling the interview if the public safety officer asserts their right to representation which usually is not immediately available.

In Section 3305. Comments adverse to interest; entry in personnel file or in other record; opportunity to read and sign instrument; refusal to sign also carry additional requirements. By statute, State and County employees have the ability in some fashion to respond to adverse comments placed in their personnel file. Employees of a City do not share that same statutory right. Sections 3305 and 3306 place further requirements upon the employer, and provide additional rights to the employee, again not available under *Skelly*.

Section 3305 provides to all covered public safety officers the right to first examine and sign any comment adverse to his interest before being placed in his personnel or other file used for personnel purposes. This requirement even goes beyond what is provided to State and County employees. A supervisor cannot simply present an employee with an adverse counseling memo and advise that it is being placed in the employee's personnel file, which is what occurs with an employee not covered by POBR. The public safety officer may also refuse to sign the adverse document, in which case that fact is noted on the document and signed or initialed by such officer. Section 3306 goes further into the response to such adverse comments.

Section 3306 provides a public safety officer the ability to file a written response to any adverse comment. State and County employees, including those not covered by POBR have a separate statutory right to respond to such comment or document. Except through language in either personnel rules or agreed upon in a collective bargaining agreement, both which can vary greatly, City employees not covered by POBR have no statutory right to respond to such documents. All public safety officers, including those employed by a City, have that right provided by this section of POBR. Although minimal, Sections 3305 and 3306 do have an impact in increased professional and clerical time.

Another significant difference between *Skelly* and POBR is in level of discipline which is covered. As mentioned earlier, *Skelly* would not apply in cases of transfers and letters of reprimand. Case law related to *Skelly* weakens the protection in suspension cases (*Civil Service Assn. v. City and County of San Francisco, 22 Cal 3d 552*) by allowing imposition of "minor" suspensions without procedural due process provided under *Skelly*. In the Civil Service case, "minor" was defined as five (5), possibly ten (10) days or less. Employers who impose such suspensions without such pre-suspension hearings, must provide that hearing under Section 3304 of POBR.

Section 3304. Lawful exercise of rights; insubordination; administrative appeal contains additional language not covered by *Skelly*. Portions of punitive action defined in POBR are covered by *Skelly*. 3304 (b) also includes "denial of promotion on grounds other than merit." This safeguard is another example where an administrative hearing required by POBR results in increased costs in professional and clerical time.

In the City of Sacramento, professional and clerical rates are estimated as follows:

Professional	$41.00 to $94.00 per hour
Clerical	$21.00 to $30.00 per hour

The rates vary due to level of clerical or professional employees assigned to particular tasks involved such as copying, transcribing, review before release of information, and scheduling and providing and administrative hearing. On average, the typical internal affairs interview is approximately forty-five (45)minutes in length. Upon request, a copy of the tape and transcription of an interview involves approximately four (4) hours of clerical time and approximately thirty (30) minutes of professional time. To provide a copy of the notes, complaints, reports as stated in POBR in an average Internal Affairs file would involve approximately two (2) hours of clerical time and approximately thirty (30) minutes of professional time. Professional time in the above examples would most likely be at the lower rate. The cost to provide an administrative hearing would be upwards to the greater rate depending upon the rank of command staff or management present for the hearing.

We hope this clarifies for the Commission our position that POBR is substantially broader than *Skelly*.

Should you have any questions, do not hesitate to contact me.

Sincerely,

Edward J. Takach
Labor Relations Officer

STATE OF CALIFORNIA

COMMISSION ON STATE MANDATES
1300 I STREET, SUITE 950
AMENTO, CA 95814
323-3562

EXHIBIT G

March 19, 1998

Ms. Dee Contreras
Mr. Edward J. Takach
City of Sacramento
Department of Employee Relations
926 J Street, Room 201
Sacramento, CA 95814-2716

Mr. Jim Apps
Department of Finance
915 L Street, 8th Floor
Sacramento, CA 95814

And Interested Parties (See Mailing list)

RE: CSM-4499
Test Claim of the City of Sacramento
Government Code Sections 3300 through 3311
Peace Officers Procedural Bill of Rights

Commission staff has conducted preliminary research of the test claim statutes and relevant case law. This preliminary research indicates that Government Code sections 3304, 3305 and 3306 relate to an officer's property and liberty interests and, therefore, merely implement the procedural requirements of the Due Process Clause of the 14th Amendment to the U.S. Constitution. In other words, the same activities would be required by local agencies under federal law in the absence of POBAR. Thus, a reimbursable state mandated program may not exist with regard to these statutes.

Although not an exhaustive list, staff finds the following cases relevant to this test claim:

- *Doyle v. City of Chino* (1981) 117 Cal.App.3d 673, 680.
- *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1807.
- *Riveros v. City of Los Angeles* (1996) 41 Cal.App.4th 1342, 1359.
- *Murden v. County of Sacramento* (1984) 160 Cal.App.3d 302.
- *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340.
- *Wilkerson v. City of Placentia* (1981) 118 Cal.App.3d 435.
- *Phillips v. Civil Service Com.* (1987) 192 Cal.App.3d 996.
- *Civil Service Assn. v. City and County of San Francisco* (1978) 22 Cal.3d 552.

- *Board of Regents v. Roth* (1972) 408 U.S. 564.
- *Codd v. Velger* (1977) 429 U.S. 624.

Although the parties have touched on the issue of due process relating to the *Skelly* decision, due process under the 14th Amendment is broader than what is discussed under *Skelly*. Therefore, staff is unable to complete its review and analysis of this test claim without supplemental responses from the claimant and the Department of Finance to the following issues:

1. How are the activities under Government Code sections 3304, 3305 and 3306 any different than what is already required of local agencies under the 14th amendment. When discussing the Due Process Clause and the opportunity for an administrative appeal provided in section 3304, please address each of the punitive actions listed in section 3303 (i.e., dismissal, demotion, suspension, reduction in salary, written reprimand, and transfer for purposes of punishment.)

2. In the claimant's response dated September 5, 1997, the claimant alleges that state and county employees have a statutory right to respond to adverse comments in addition to Government Code sections 3305 and 3306. The claimant asserts that city employees have no such additional statutory right. Please comment on this allegation and identify the statute(s) and case law, if any, relied upon.

Enclosed are copies of the cases listed above. *Staff requests the claimant and the Department of Finance to file supplemental responses by* ***April 20, 1998.***

Should you have any questions regarding the above, please call me.

Sincerely,

Camille Shelton

CAMILLE SHELTON
Staff Counsel

c. Allan Burdick (w/enclosures)
mailing list (w/o enclosures)

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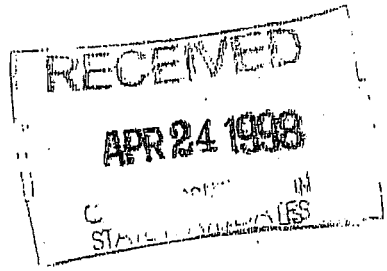
STATE OF CALIFORNIA

DEPARTMENT OF FINANCE
915 L STREET
SACRAMENTO, CA 95814-3706

EXHIBIT H



April 22, 1998

Ms. Paula Higashi
Executive Director
Commission on State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814

Dear Ms. Higashi:

This is in response to your letter of March 19, 1998, regarding the test claim submitted by the City of Sacramento (Claim No. CSM-4499), which alleges that Government Code Sections 3303 and 3304 of the "Peace Officers Bill of Rights" contain state mandated reimbursable costs. The letter requests that the Department of Finance respond to questions regarding the differences between the due process activities required by Government Code Sections 3304, 3305 and 3306 as compared to the 14th Amendment of the U.S. Constitution. You have also requested our comments on the claimant's allegations regarding state, county and city employees' statutory right to respond to adverse comments.

As noted in our July 17, 1996 letter to your office, our analysis concludes that the statutes do not contain a reimbursable state mandate to local government. We are once again advising you that we oppose the finding of a reimbursable mandate in this case. Furthermore, we are unable to provide a response to the expanded legal questions raised in your letter at this time because we are currently without legal counsel due to the recent departure of our department's attorney to another agency. We understand that the State Personnel Board's legal counsel has reviewed these issues and will be responding to your questions on behalf of the State.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Louise Heredia-Sauseda, Principal Program Budget Analyst at (916) 445-8913 or James Apps, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Calvin Smith

S. CALVIN SMITH
Program Budget Manager

Attachments

PROOF OF SERVICE

Test Claim Name: PEACE OFFICER PROCEDURAL RIGHTS
Test Claim Number: CSM-4499

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 8 Floor, Sacramento, CA 95814.

On April 22, 1998, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814
Facsimile No. 445-0278

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: William Ashby
3301 C Street, Room 500
Sacramento, CA 95816

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

League of California Cities
Attention: Ernie Silva
1400 K Street
Sacramento, CA 95815

Mr. Steve Smith, CEO
Mandated Cost Systems
2275 Watt Avenue, Suite C
Sacramento, CA 95825

Mr. Walter Vaughn, Executive Officer
State Personnel Board
801 Capitol Mall, Room 570
Sacramento, CA 95814

Wellhouse and Associates
Attention: David Wellhouse
9175 Kiefer Boulevard, Suite 121
Sacramento, CA 95826

Mr. Paul Minney, Interested Party
Girard & Vinson
1676 N. California Boulevard, Suite 450
Walnut Creek, CA 94596

David M. Griffith & Associates
Attention: Allan Burdick
4320 Auburn Boulevard, Suite 2000
Sacramento, CA 95841

Ms. Dee Contreras, Director of Labor Relations
Office of Labor Relations
9210 10th Street, Room 601
Sacramento, CA 95814

City of Sacramento
Department of Employee Relations
926 J Street, Room 201
Sacramento, CA 95814-2716

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 22, 1998 at Sacramento, California.

Richelle Deremo

Richelle Deremo

EXHIBIT I

JUN 19 1998

STATE MANDATES

OFFICE OF
LABOR RELATIONS

CITY OF SACRAMENTO
CALIFORNIA

921 10TH STREET
ROOM 601
SACRAMENTO, CA
95814-2711

PH 916-264-5424
FAX 916-264-8110

June 17, 1998

Ms. Paula Higashi
Executive Director
Commission On State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814

Attn: Camille Shelton
Staff Counsel

RE: CSM-4499
Test Claim of the City of Sacramento
Government Code Sections 3300 through 3311
Peace Officers Procedural Bill of Rights

This is in response to your March 19, 1998 request for supplemental responses.

1. How are the activities under Government Code Sections 3304, 3305 and 3306 any different than what is already required of local agencies under the 14th Amendment.

Response

It remains our position that the 14th Amendment does not, and was not meant to, cover actions such as a written reprimand, transfer for the purpose of punishment (where no other loss such as salary attaches) mentioned in section 3303, or denial of promotion on grounds other than merit as indicated in section 3304.

One difference which stands out is the fact that those Government Code sections cover peace officers as defined by the statute only. Miscellaneous employees (such as technical, professional and administrative that are not sworn peace officers) are not eligible for the same rights conferred upon peace officers by POBR. That reason alone provides requirements upon local agencies which differ from those under the 14th Amendment. Miscellaneous employees do not share the protections in terms of being interviewed or the procedural pieces of investigations (recordings, copies of previous interviews, etc.) which could lead to punitive action, or the protection from re-assignment as provided in section 3303 to peace officers.

A hearing provided by an employer for a written reprimand, transfer, or denial of promotion, where no property right has attached goes beyond the due process clause. Obviously, in any dismissal, demotion, suspension, or reduction in salary, a property right has attached with due process considerations.

2. Claimant alleges that state and county employees have a statutory right to respond to adverse comments in addition to Government Code sections 3305 and 3306 and that city employees have no such additional statutory right. Please comment on this allegation and identify the statute(s) and case law, if any, relied upon.

Response

County employees have a statutory right as stated above pursuant to Government Code section 31011 to inspect, respond in writing or in person, and that written responses must be included in the file. Government Code sections 19574 and 19589 provide similar protections to state employees. While Labor Code section 1198.5 allows city employees to review, it does not provide a manner in which to respond to adverse comments, and in fact, does not even allow for copies to be made.

If the protections of POBR provide no greater protections than those under the 14th Amendment, then what purpose does POBR serve, and why is there continual effort to amend POBR to add greater protections? The most recent amendment placed a mandate upon public employers that proposed discipline be served upon a peace officer employee within one (1) year of the date the act is discovered by the employer. I believe this, and our response on September 5, 1997 clearly show that POBR provides protections which are beyond *Skelly* or the due process clause of the 14th Amendment.

Should you have any questions, do not hesitate to contact me.

Sincerely,

Edward J. Takach
Labor Relations Officer

EXHIBIT J

CALIFORNIA STATE PERSONNEL BOARD
801 Capitol Mall • Sacramento, CA 95814

June 17, 1998

FAX AND U.S. MAIL

Paula Higashi, Executive Director
Commission on State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814

RE: CSM-4499
Test claim of the City of Sacramento
Government Code Sections 3300 and 3311
Public Safety Officers Procedural Bill of Rights

Dear Ms. Higashi:

The Department of Finance has requested that the State Personnel Board respond to the Commission's letter of March 19, 1998. In that letter, you question whether the provisions of the Public Safety Officers Procedural Bill of Rights Act (POBOR) cited by the claimants can be construed as implementing the procedural requirements of the due process clause of the 14th Amendment to the United States Constitution.

1. **Several courts have recognized the ties between an employee's constitutional due process rights and the statutory rights afforded by the POBOR.**

In *Riveros v. City of Los Angeles* (1996) 41 Cal.App.4th 1342, 1359, an appellate court affirmed the right of a probationary peace officer, rejected during probation based on allegations of misconduct which could stigmatize his reputation, to an administrative appeal pursuant to Government Code section 3304.[1] In so doing, the court noted:

"The right to such a hearing arises from the due process protections of the Fourteenth Amendment to the United States Constitution. The limited purpose of the section 3304 appeal is to give the peace officer a chance to establish a formal record of the circumstances surrounding his termination and try to convince his employer to reverse its decision, either by showing that the charges are false or through proof of mitigating circumstances [citation omitted]. This is very nearly the same purpose for the hearing mandated by due process requirements, which must afford the officer a chance to refute the charges or clear his name."

[1] All statutory references are to the Government Code, unless otherwise noted.

In *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1807, a case involving the discharge of a police chief and the adequacy of the city's appeal procedure, the court noted that absent local rules or memoranda of understanding prescribing the scope of an administrative appeal hearing conducted pursuant to section 3304, the adequacy of any such appeal procedure "must be measured according to constitutional due process principles."

An appellate court has opined that by enacting POBOR, the California Legislature made it clear that public safety officers may not be subjected to punitive action, or interrogation that could lead to punitive action, without being afforded certain procedural protection, all of which are directly related "to the important due process value of promoting accuracy and reasonable predictability in governmental decision making when individuals are subject to deprivatory action." (emphasis added) [*Benach v. County of Los Angeles* (1997) 60 Cal.App.4th 637 (unpublished), citing *People v. Ramirez* (1979) 25 Cal.3d 260, 267].

Other courts have recognized that the concept of due process includes "a meaningful and adequate opportunity" for the employee "to refute the charges and clear his name" and that that opportunity encompasses the chance to conduct "his own investigation or present his own evidence." [See *Murden v. County of Sacramento* (1984) 160 Cal.App.3d 302; *Lubey v. City and county of San Francisco* (1979) 98 Cal.App.3d 340].

Thus, by affording an employee the tools necessary to conduct his or her own investigation, the procedural protections set forth in section 3303(g) of POBOR assure the employee a meaningful opportunity to conduct his/her own investigation and present his/her own evidence. The same protections thereby promote accuracy in decision-making. The POBOR provisions requiring that an employee be made aware of adverse comments in his or her personnel file and be allowed to respond in writing to those comments (sections 3305 and 3306) further the same due process values.

2. The administrative appeal provided for in section 3304(b) differs a little from what would otherwise be required of local agencies by the 14th Amendment to the United States Constitution.

As noted above, a review of the case law dealing with the POBOR administrative appeals reveals a tendency by the courts to assess the adequacy of the appeal rights afforded under POBOR with reference to federal due process requirements. The courts have clearly said that due process under the 14th Amendment is a flexible concept: what process is due may vary based on several factors, most notably the nature of the deprivation. Similarly, courts have flexibly interpreted the right to an "administrative appeal" under POBOR.

What follows is in response to your request for a comparison of the appeal rights accorded under the due process clause v. POBOR for the actions you designated.

Opportunity to be Heard as Required by Due Process

The United States Supreme Court has not yet resolved the issue of whether "the protections of the federal due process clause extend to discipline of tenured public employees short of termination." (Gilbert v. Homar (1997) 520 U.S. ___ [138 L.Ed.2d 120]

California courts, however, have required, with some variations as to the nature of the hearing and timing of the hearing provided, adherence to the due process rights delineated in *Skelly v. State Personnel Board (1975) 15 Cal.3d 194* in cases where the employee has been dismissed (*Chang v. City of Palos Verdes Estates* (1979) 98 Cal.App.3d 557, 563), demoted (*Ng v. State Personnel Board* (1977) 68 Cal.App.3d 600, 606, suspended without pay (*Civil Service Assn. v. City and County of San Francisco* (1978) 22 Cal.3d 552, 558, and transferred for disciplinary reasons (*Runyon v. Ellis* (1995) 40 Cal.App.4th 961). Clearly, an employee who has suffered a pay reduction is entitled to no less due process than an employee who has been suspended. A probationary employee who is terminated for stigmatizing misconduct has a due process liberty interest right to a name-clearing hearing. (*Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340).

At least one court has held that even an employee who suffers a written reprimand is entitled to some procedural due process, albeit not to a *pre-disciplinary* hearing; the court noted that the employee's procedural due process rights were adequately protected by the administrative appeal to be afforded under POBOR. (*Stanton v. City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1442).

Administrative Appeal as Required by POBOR

POBOR similarly requires that a public agency must afford a public safety officer an opportunity for an administrative appeal from a punitive action, defined as "any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand or transfer for purposes of punishment," and from a "denial of promotion on grounds other than merit."[2] Cases interpreting POBOR have also held that a probationary employee may be entitled to an administrative appeal if that employee was rejected for misconduct that stigmatizes his or her reputation. (*Riveros v. City of Los Angeles* (1996) 41 Cal.App.4th 1342, modified on denial of rehearing).

[2] While the definitional language of the statute is somewhat inartful, case law seems to be refining the definition so that the right to the administrative appeal does not attach until a decision to take the punitive action has been made. The "lead to" language in the statute was probably meant to refer back to the interrogation process-- in other words, interrogations that could "lead to" punitive actions are governed by the provisions in section 3303.

CONCLUSION

The procedural protections accorded a public safety officer under POBOR are directly related to established due process values: due process requires that where the government seeks to deprive an employee of a protected liberty or property interest, that employee be afforded a meaningful chance to refute the charges through notice and opportunity to conduct his or her own investigation or present his or her own evidence.

The POBOR protections afforded public safety officers during interrogations, the rights afforded officers facing punitive action, and those protections afforded officers who have had adverse comments entered their personnel files all further important due process values. Given that a recognized value in federal due process is, to a great extent, to promote accuracy in governmental decision-making, one can assume that a governmental entity implementing POBOR will achieve a greater accuracy in its decision-making in the personnel arena. Such increased accuracy should clearly translate into cost savings as fewer decisions should be challenged and those that are challenged should be upheld on a more frequent basis, resulting in fewer back pay awards. In addition, an employee accorded POBOR protections resulting in a fairly considered decision may be less likely to file retaliatory litigation against a governmental employer. All these cost savings should more than offset any costs that might be attributable solely to the enactment of POBOR.

If you have any further questions regarding these matters, please feel free to contact Elise S. Rose, Chief Counsel of the State Personnel Board at (916) 653-1403.

Sincerely,

Walter Vaughn

Walter Vaughn
Executive Officer
State Personnel Board

cc: Floyd Shimomura, Chief Counsel
Department of Finance

[POBOR.LTR]

EXHIBIT K

COMMENTS TO DRAFT STAFF ANALYSIS
Dated July 6, 1999
By CLAIMANT, CITY OF SACRAMENTO
CSM 4499
Peace Officers Procedural Bill of Rights
Government Code Sections 3300 through 3310

I, Dee Contreras, state:

That I am the Director of Labor Relations for the City of Sacramento, which position I have held since November, 1995. From 1990 until November 1995, I was the senior labor relations representative for the City of Sacramento. In these positions, my duties include negotiations with unions pursuant to the Meyers-Milias-Brown Act, contract administration, processing grievances, discipline review for police and fire, as well as miscellaneous employees. Thus, I have been personally responsible for the review of police discipline matters. In these positions, I have been involved in all areas of management labor relations.

I have been involved in the labor relations area since 1980. I was a labor union representative from August of 1980 until June of 1990. I represented employees in disciplinary actions and hearings. I represented and defended the employees and unions in grievances. I negotiated and reviewed civil service rules and their application. I was thus involved in all aspects of labor relations from the union side for this period of time.

From my substantial experience in representing both labor and management, I am extremely familiar with both the *Skelly* process as well as the Peace Officers Procedural Bill of Rights.

That I have personal knowledge of the facts stated herein, and if called upon to testify, I could do so competently.

That I have read the Draft Staff Analysis of the Commission on State Mandates' staff dated July 6, 1999. Given the complex nature of the issues presented by this test claim, the Commission's staff has done an admirable job. However, there are certain issues which the City of Sacramento believes were not adequately addressed, or are not reflective of the reality of public sector labor relations.

Preliminarily, it should be noted that the City of Sacramento agrees that those duties required to be performed to satisfy the due process requirements of the United States' and California Constitutions pursuant to *Skelly* v. *State Personnel Board* (1975) 15 Cal.3d 194 are preexisting constitutional requirements, and thus not a reimbursable mandate. It is those requirements which exceed *Skelly* and are required by the Peace Officers Procedural Bill of Rights that form the foundation for a reimbursable mandate.

In order to better understand the difference between *Skelly* and the Peace Officers Procedural Bill of Rights (hereinafter referred to as "POBAR", a brief outline of the two different systems is warranted.

1. **General Description of *Skelly* and POBAR**

The requirements of *Skelly* were aptly described by Justice Sullivan in his opinion, as follows:

> ". . . It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, . . . due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." *Skelly, supra* at p. 215, *see* Draft Staff Analysis at page 161.

As the Draft Staff Analysis notes, these protections are required to be given to permanent civil service employees subject to dismissal, demotion, long term suspension and reduction in salary. These protections are not afforded to short term suspensions, reclassifications or reprimands. *See, Civil Service Assn.* v. *City and County of San Francisco* (1978) 22 Cal.3d 552, 558-564; *Schultz* v. *Regents of University of California* (1984) 160 Cal.App.3d 768, 775-787; *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1441-1442.[1]

These protections are not afforded to employees who serve "at will", or at the pleasure of the appointing authority; there must be a legitimate claim of entitlement to continued employment before due process requires predisciplinary safeguards. *See, Board of Regents of State* Colleges v. *Roth* (1972) 408 U.S. 564, 577-578, 92 S.Ct. 2701, 2709-2710; *Shoemaker* v. *County of Los Angeles* (1995) 37 Cal.App.4th 618, 630-631; *Hill* v. *California State University, San Diego* (1987) 193 Cal.App.3d 1081, 1088.

Under *Skelly*'s progeny, there is also a "liberty" interest. This interest attaches when an employee is dismissed or not hired and the employing agency "makes a 'charge against him that might seriously damage his standing and associations in the community,' such as a charge of dishonesty or immorality, or would 'impose [] on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.' [Citations omitted.] A person's

[1] See more detailed discussion *infra* concerning written reprimands.

protected interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. [Citations omitted.] Rather, the liberty interest is infringed only when the defamation is made in connection with the loss of a government benefit, such as, in this case, employment. [Citations omitted.]" *Murden* v. *County of Sacramento* (1984) 160 Cal.App.3d 302, 308.

The purpose of a "liberty interest" hearing, which may occur after the discipline, is to provide a hearing to allow the person to clear his name. *Murden, supra* at 310.

In contrast to the very basic requirements which are afforded by either a "property" or "liberty" hearing, the requirements of POBAR are more stringent, both qualitatively and quantitatively.

Government Code, Section 3303 speaks to the rights of peace officers subject to "interrogation", and provides substantial safeguards. Section 3304 speaks to the rights of the peace officer regarding procedural safeguards, including the right to a hearing, and statute of limitations concerning how long the agency has to use acts as a basis for discipline. Those sections read as follows:

> 3303. When any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action, the interrogation shall be conducted under the following conditions. For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.
>
> (a) The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If the interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for any off-duty time in accordance with regular department procedures, and the public safety officer shall not be released from employment for any work missed.
>
> (b) The public safety officer under investigation shall be informed prior to the interrogation of the rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time.

(c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

(d) The interrogating session shall be for a reasonable period taking into consideration gravity and complexity of the issue being investigated. The person under interrogation shall be allowed to attend to his or her own personal physical necessities.

(e) The public safety officer under interrogation shall not be subjected to offensive language or threatened with punitive action, except that an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action. No promise of reward shall be made as an inducement to answering any question. The employer shall not cause the public safety officer under interrogation to be subjected to visits by the press or news media without his or her express consent nor shall his or her home address or photograph be given to the press or news media without his or her express consent.

(f) No statement made during interrogation by a public safety officer under duress, coercion, or threat of punitive action shall be admissible in any subsequent civil proceeding. This subdivision is subject to the following qualifications:

(1) This subdivision shall not limit the use of statements made by a public safety officer when the employing public safety department is seeking civil sanctions against any public safety officer, including disciplinary action brought under Section 19572.

(2) This subdivision shall not prevent the admissibility of statements made by the public safety officer under interrogation in any civil action, including administrative actions, brought by that public safety officer, or that officer's exclusive representative, arising out of a disciplinary action.

(3) This subdivision shall not prevent statements made by a public safety officer under interrogation from being used to impeach the testimony of that officer after an in camera review to determine whether the statements serve to impeach the testimony of the officer.

(4) This subdivision shall not otherwise prevent the admissibility of statements made by a public safety officer under interrogation if that officer subsequently is deceased.

(g) The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any

reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports that are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation.

(h) If prior to or during the interrogation of a public safety officer it is deemed that he or she may be charged with a criminal offense, he or she shall be immediately informed of his or her constitutional rights.

(I) Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters that are likely to result in punitive action against any public safety officer, that officer, at his or her request, shall have the right to be represented by a representative of his or her choice who may be present at all times during the interrogation. The representative shall not be a person subject to the same investigation. The representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters.

This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities.

(j) No public safety officer shall be loaned or temporarily reassigned to a location or duty assignment if a sworn member of his or her department would not normally be sent to that location or would not normally be given that duty assignment under similar circumstances.

3304. (a) No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure.

Nothing in this section shall preclude a head of an agency from ordering a public safety officer to cooperate with other agencies involved in criminal investigations. If an officer fails to comply with such an order, the agency may officially charge him or her with insubordination.

(b) No punitive action, nor denial of promotion on grounds

other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal.

(c) No chief of police may be removed by a public agency, or appointing authority, without providing the chief of police with written notice and the reason or reasons therefor and an opportunity for administrative appeal.

For purposes of this subdivision, the removal of a chief of police by a public agency or appointing authority, for the purpose of implementing the goals or policies, or both, of the public agency or appointing authority, for reasons including, but not limited to, incompatibility of management styles or as a result of a change in administration, shall be sufficient to constitute "reason or reasons."

Nothing in this subdivision shall be construed to create a property interest, where one does not exist by rule or law, in the job of Chief of Police.

(d) Except as provided in this subdivision and subdivision (g), no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall apply only if the act, omission, or other misconduct occurred on or after January 1, 1998. In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed disciplinary action within that year, except in any of the following circumstances:

(1) If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period.

(2) If the public safety officer waives the one-year time period in writing, the time period shall be tolled for the period of time specified in the written waiver.

(3) If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.

(4) If the investigation involves more than one employee and requires a reasonable extension.

(5) If the investigation involves an employee who is

incapacitated or otherwise unavailable.

(6) If the investigation involves a matter in civil litigation where the public safety officer is named as a party defendant, the one-year time period shall be tolled while that civil action is pending.

(7) If the investigation involves a matter in criminal litigation where the complainant is a criminal defendant, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution.

(8) If the investigation involves an allegation of workers' compensation fraud on the part of the public safety officer.

(e) Where a predisciplinary response or grievance procedure is required or utilized, the time for this response or procedure shall not be governed or limited by this chapter.

(f) If, after investigation and any predisciplinary response or procedure, the public agency decides to impose discipline, the public agency shall notify the public safety officer in writing of its decision to impose discipline, including the date that the discipline will be imposed, within 30 days of its decision, except if the public safety officer is unavailable for discipline.

(g) Notwithstanding the one-year time period specified in subdivision (c), an investigation may be reopened against a public safety officer if both of the following circumstances exist:

(1) Significant new evidence has been discovered that is likely to affect the outcome of the investigation.

(2) One of the following conditions exist:

(A) The evidence could not reasonably have been discovered in the normal course of investigation without resorting to extraordinary measures by the agency.

(B) The evidence resulted from the public safety officer's predisciplinary response or procedure.

(h) For those members listed in subdivision (a) of Section 830.2 of the Penal Code, the 30-day time period provided for in subdivision (e) shall not commence with the service of a preliminary notice of adverse action, should the public agency elect to provide the public safety officer with such a notice.

From a brief review of just the foregoing sections, it is clear that the interests protected by POBAR far exceed the requirements of *Skelly*.

2. Written Reprimands Are Not Subject to *Skelly*

The Draft Staff Analysis on page 11, and particularly in footnote 20 thereon, and

thereafter, asserts that *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438 stands for the proposition that pursuant to *Skelly*, a permanent employee is entitled to a due process hearing when presented with a written reprimand. Under this rationale, any administrative hearing requested on a written reprimand would not be a reimbursable element of this test claim. The City of Sacramento respectfully disagrees with this conclusion, as *Stanton* stands for the proposition that *Skelly* specifically does not require any due process hearings in conjunction with a written reprimand.

Stanton involved a permanent peace officer employed by the City of West Sacramento, who received a written reprimand. The Memorandum of Understanding negotiated between the West Sacramento Police Officers Association and the City of West Sacramento[2], provided that written reprimands issued by a supervisor were appealable to the Chief of Police; and further that those written reprimands issued by the Chief of Police were appealable only to the Appointing Authority or his or her designee. As Stanton's written reprimand was issued by his supervisor, he appealed to the Police Chief, who held a hearing at which Mr. Stanton was represented by counsel, and presented evidence on his behalf. The Chief upheld the written reprimand and denied the appeal.

Not satisfied with the results of the appeal, Mr. Stanton filed a writ of mandate in superior court alleging that he was entitled to an administrative appeal pursuant to the City's personnel rules and MOU. Mr. Stanton further argued that the appeal rights afford him under the MOU conflicted with the due process rights guaranteed by *Skelly*.

Accordingly, when the matter was reviewed by the Appellate Court, the first issue undertaken was whether the MOU conflicted with the due process rights enunciated in *Skelly*. The court held that the guarantees of *Skelly* specifically do not apply to a written reprimand afforded a permanent employee, and to that effect, the court stated as follows:

> ". . . As the City notes, no authority supports plaintiff's underlying assertion that issuance of a written reprimand triggers the due process safeguards outlined in Skelly. Courts have required adherence to Skelly in cases in which an employee is demoted (Ng v. State Personnel Bd. (1977) 68 Cal.App.3d 600, 606 [137 Cal.Rptr. 387]); suspended without pay (Civil Service Assn. v. City and County of San Francisco (1978) 22 Cal.3d 552, 558-560 [150 Cal.Rptr. 129, 586 P.3d 162]); or dismissed (Chang v. City of Palos Verdes Estates (1979) 98 Cal.App.3d 557, 563 [159 Cal.Rptr. 630]). We find no authority mandating adherence to Skelly when a written reprimand is

[2] These Memoranda of Understanding are commonly referred to as "MOU"'s, and are authorized pursuant to the Meyers-Milias-Brown Act, Government Code, Sections 3500 *et seq.* *See, Santa Clara County District Attorney Investigators Association* v. *County of Santa Clara* (1975) 51 Cal.App.3d 255.

issued.

> "We see no justification for extending Skelly to situations involving written reprimands. Demotion, suspension and dismissal all involve depriving the public employee of pay or benefits; a written reprimand results in no such loss to the employee." *Stanton, supra* at 1442; *see also* Draft Staff Analysis (July 6, 1999) at p. 311.

The case then goes on to find that the procedural details as outlined in the MOU comply with the Peace Officers Bill of Rights, particularly Government Code, Section 3304(b).

Accordingly, there are no preexisting requirements for an administrative hearing to satisfy the due process requirements of *Skelly* for a written reprimand absent the Peace Officer's Bill of Rights. The City of Sacramento respectfully requests that the Draft Staff Analysis be amended to so reflect.

3. **Transfer For Purposes of Punishment**

POBAR provides, in Government Code, Section 3304, that the employee subject to a transfer "for purposes of punishment" is entitled to an administrative appeal. The issue thus becomes what is a transfer for purposes of punishment, versus transfers for other issues, such as for management prerogative, to address staffing needs, or to compensate for a deficiency in performance. In the world of labor relations, often what constitutes a punitive transfer is in the eye of the employee. Accordingly, the City of Sacramento wishes the Commission to understand that in the field of labor relations, peace officers will often request a full POBAR hearing and procedure on a transfer which is not acceptable to the officer in question.

An analysis of cases involving transfers will demonstrate that the law in this area is quite clear: a transfer to punish for a deficiency in performance entitles the employee to a POBAR hearing, whereas a transfer to compensate for a deficiency in performance is not punitive and does not entitle one to a POBAR hearing. However, the difference is only noted by the court when an employee contests the denial of a hearing.

In *Heyenga* v. *City of San Diego* (1979) 94 Cal.App.3d 756, two officers were transferred from the northern to the central division of the police department. While off duty, the officers had become involved in a minor incident in a local pub. One of the officers was exonerated, and the other's investigation was pending when the transfer order was made. Both officers were denied an administrative hearing and filed suit for preliminary injunction to preclude their transfers until after a POBAR hearing was held, contending that the transfers were punitive.

At the hearing, it was ascertained that the premise for the transfer by the department was that the department knew of the off duty conduct, as well as other conduct. Although the department viewed these officers as average with the potential for future advancement, the department believed

that a transfer to the central division would result in a more restricted geographical area with greater supervisory support. The department denied that the transfers were for a punitive reason.

The court, in reviewing the facts, believed that the transfers were punitive because of the officers' off duty conduct. Based upon that factor, the appellate court ruled that the issuance of a preliminary injunction to preclude the transfer pending a full POBAR hearing was appropriate: there would be no harm to the city in delaying the transfer, whereas to disallow a pretransfer hearing would be to divest the officers of any remedy at all.

A totally different view of transfer was contained in *Orange County Employees Association, Inc.* v. *County of Orange* (1988) 205 Cal.App.3d 1289. This case involved Vaughn Roley, who was the division director of a probation facility for delinquent boys. After holding that position for 16 years, he was transferred to the post of director of juvenile court services. There was no difference in his title or pay; in fact, shortly after his transfer, he received a pay raise.

Mr. Roley contended that the purpose of the transfer was punitive. Prior to his transfer, one of his subordinates complained that Roley's subordinate had been sexually harassing. Additionally, there were questions concerning Mr. Roley's performance in the handling of certain trailer rentals, the disposal of cooking grease along an access road and use of a facility by a boy's club. This resulted in the chief probation officer questioning whether he had the right person in the position in question. Accordingly, the chief probation officer transferred Mr. Roley.

Mr. Roley contended that the transfer was punitive, whereas the chief probation officer contended it was not. Mr. Roley demanded, and was denied, a POBAR hearing, and this suit ensued.

The court spent much time analyzing the result of the transfer: there was no reduction in pay or decrease in benefits; most directors were rotated through various positions although Mr. Roley had spent more time in his position than most; no disciplinary action had been taken. The court that it could find no cases where a transfer, unaccompanied by actions adverse to the officer, were found to be punitive. In its discussion as to what constitutes a punitive transfer, the court spoke as follows:

> ". . . The flaw in Roley's argument is revealed in the first page of his reply brief: 'But Mr. Roley's transfer was punitive, since it was based on perceived deficient performance. Appellant assumes transfers based on performance deficiencies, whether perceived or real, are per se punitive. Deficiencies in performance are a fact of life. Right hand hitters sit on the bench against certain pitchers, some professors write better than they lecture, some judges are more temperamental with criminal cases than others. The manager, chancellor or presiding jurist must attempt to find the proper role for his personnel. Switching Casey from shortstop to second base because he can't throw to first as fast as Jones is not in and of itself

a punitive transfer:

> "The trial judge weighed and considered this very issue when it observed: '. . . it appears to the court that there is a difference between a transfer to punish for a deficiency in performance, versus a transfer to compensate for a deficiency in performance. In other words, if a person is deficient in performance and they are transferred someplace else where that deficiency will not matter or is compensated for by the new assignment, that is not necessarily punitive. It can be just the opposite of punitive. . . .'" *Supra* at 294; *See,* Draft Staff Analysis, page 278.

Thus, in considering what constitutes a transfer for purposes of punishment, it should be noted that frequently what constitutes punishment is in the eyes of the employee. Accordingly, in the finding of a mandate or subsequently in the preparation of Parameters and Guidelines, the foregoing should be kept in mind.

4. Adverse Comments

POBAR goes far beyond *Skelly* when it comes to adverse comments. In that respect, Government Code, section 3305 states as follows:

> No public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware of such comment, except that such entry may be made if after reading such instrument the public safety officer refuses to sign it. Should a public safety officer refuse to sign, that fact shall be noted on that document, and signed or initialed by such officer.

Adverse comments include such things as a report by an independent Board of Police Commissioners[3] and a Citizens Law Enforcement Review Board.[4]

The right to comment on any adverse comments or written reprimands consists of more than what one might think at first blush. First of all, there is a determination as to whether the

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[3] *Hopson* v. *City of Los Angeles* (1983) 139 Cal.App.3d 347.

[4] *Caloca* v. *County of San Diego*, D029663, Fourth Appellate District, June 9, 1999, certified for publication.

comment is, in fact, adverse. A comment or report which may be neutral in management's view, might well be adverse in the eyes of the employee. The employee must have time to examine the comment and have the ability to respond. The employee will utilize work time to examine the comment and respond, and often responses are neither simple nor perfunctory. When the employee comments, management then will review the comment, attach it to the adverse comment, and file same with the employee's personnel file. All of this time is work time.

5. Tape Recording Of Interrogation And Documents Provided to Employee

The Draft Staff Analysis concludes that only in certain circumstances is the tape recording of an interrogation a reimbursable activity for the mandate in question, and states that no documents provided to the employee are reimbursable. We believe that this is too narrow a reading of the requirements of *Skelly*, and disregards the reality of labor relations.

As shown above, Government Code, Section 3303(g)[5] allows the interrogation of a peace officer to be tape recorded. The section is silent as to whom may record the interrogation, and who may request that the session be recorded. In practice, the employee will almost always request to record the interrogation. As the employee desires to record same, the employer is faced with the requirement of also tape recording the interrogation in order to assure that the employee's tape is not edited, redacted, or changed in any manner, and to have a verbatim record of the proceedings. Furthermore, should the employer wish to interrogate the employee for a second time, the employee must be provided with a transcription of the prior interrogation, thus necessitating the use of a transcription service. Frequently, due to the nature of the matter at hand, expedited transcripts are necessary.

The Draft Staff Analysis opines that the due process clause requires employers to provide all materials upon which the disciplinary action is based, including the tape recording of the interrogation when a permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand[6]; or a probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal. (*See*, Draft Staff Analysis, page 17.)

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[5] It should be noted, that as originally enacted, the provision for tape recording was found in Government Code, Section 3303(f), as enacted in Chapter 465, Statutes of 1976, and stated, in pertinent part: "The complete interrogation of a public safety officer shall be recorded where practical. If a tape recording is made of the interrogation, the public safety officer shall have access tot he tape if further proceedings are contemplated or prior to any further interrogation at a subsequent time. . . ." This section was amended by Chapter 775, Statutes of 1978, to make the tape recording optional.

[6] See discussion in part 2 above, wherein the City of Sacramento contends that written reprimands are not subject to *Skelly*, and thus steps required to be taken concerning written reprimands pursuant to POBAR constitutes a reimbursable mandate.

However, due process does not require that all materials upon which the foregoing disciplinary action is based be provided to the employee. All *Skelly* requires is "notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." *Skelly* at 215. It does not require that all documents which bear upon the discipline be turned over to the employee. It further specifically does not "require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action." *Skelly* at 215. *See*, Draft Staff Analysis at 161.

At the outset, it should be noted that other than those employees covered by POBAR, no other employee has the right to tape record an interrogation. The Commission's staff has not pointed to any authority which provide the right to such employees, nor has any such authority been found.

Secondly, it must be noted that the employee who is protected by POBAR is not entitled to "discovery", a legal term denoting the ability to obtain written and oral evidence, including depositions and other materials from the other party prior to hearing. *See, Holmes* v. *Hallinan* (1998) 68 Cal.App.4th 1523, 1534; *Pasadena Police Officers Association* v. *City of Pasadena* (1990) 51 Cal.3d 564, 578-580.

Lastly, although *Skelly* requires that copies of the charges and other materials must be afforded, this does not include all investigative materials assembled by the department in the course of determining whether or not discipline is warranted. By finding that any subsequent tape recording is not a reimbursable mandate because same is required to be turned over under *Skelly* unnecessarily expands the category of "materials" required to be provided in order to afford due process. Instead of notice of the proposed action, a copy of the charges and related materials, the staff would have all investigative materials required to be turned over to the employee in question. This is not required by *Skelly* and results in the unwarranted expansion of its due process requirements.

As a matter of practice, as long as POBAR has been law, copies of all materials have been provided to the employee at the time of the *Skelly* notice, so that same can be used if the employee requests a POBAR hearing.

6. Conclusion

In conclusion, the City of Sacramento would first like to thank the Commission's staff for the work devoted to its Draft Staff Analysis. For one not accustomed to dealing in labor relations, the issues raised by this test claim can be daunting.

The impact of POBAR has gone beyond the giving of rights: it has created additional responsibilities for employer. There are a myriad of situations in which it can be invoked, which require the employer to either increase its level of activity, or risk being impacted by an employee or union through court actions, in their attempt to expand its coverage. Employee organizations are

sophisticated, and work diligently to expand the coverage of POBAR, either through court interpretations of the statutory scheme, or through legislative amendments. This necessitates that employers keep up to date on this fast changing area of the law. When that happens, employers have to review their policies and frequently expand the activities based on court decisions. If in application POBAR accomplished what it seeks to do on its face, it would be simple in its application. However, the legislation is more invidious and has created responsibilities for employers that have yet to be defined.

POBAR additionally has created areas of dispute and concern that don't exist for non-POBAR, miscellaneous employees. Just for example, there is a substantial difference in application between an administrative hearing and a due process review.

Something else which should be mentioned is the fact that POBAR is applicable to "at will" employees, which generally is applicable to management ranks and police chiefs. This has resulted in substantial effort in addressing management employees, who in no other area have the rights given to POBAR covered employees.

I intend to be present at the Commission's hearing of August 26, 1999, and will be happy to address any issues or questions about the practical application of this law.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 6th day of August, 1999 at Sacramento, California.

Dee Contreras

Filed 6/9/99

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

VICTOR CALOCA et al.,	D029663
Plaintiffs and Appellants,	
v.	(Super. Ct. No. 706089)
COUNTY OF SAN DIEGO et al.,	
Defendants and Respondents.	

APPEAL from a judgment of the Superior Court of San Diego County, Robert J. O'Neill, Judge. Reversed.

Everett L. Bobbitt and Sanford A. Toyen for Plaintiffs and Appellants.

John J. Sansone, County Counsel, Diane Bardsley, Chief Deputy County Counsel, and C. Ellen Pilsecker, Deputy County Counsel, for Defendants and Respondents.

The Citizens Law Enforcement Review Board (CLERB) reviewed citizen complaints and issued findings of serious misconduct against Sheriff Deputies Victor Caloca, Ronald Cuevas, Rick Simica, and William Smith (collectively Deputies). Deputies

together with the San Diego County Deputy Sheriffs Association (Sheriffs Association) brought a petition for writ of mandate to compel San Diego County (County) and San Diego County Civil Service Commission (Civil Service Commission) to conduct liberty interest hearings or alternatively an administrative appeal of CLERB's findings pursuant to the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). The trial court denied the petition, finding (1) Deputies are not entitled to liberty interest hearings because they had failed to show a present deprivation of liberty interests, and (2) Deputies are not entitled to an administrative appeal because they failed to show punitive action.

Deputies and Sheriffs Association appeal. We determine the trial court properly ruled Deputies are not entitled to liberty interest hearings since Deputies failed to show deprivation of a constitutionally protected liberty interest. However, we hold CLERB's findings of misconduct by Deputies constitute punitive action against them within the meaning of Government Code sections 3303 and 3304, subdivision (b). Therefore they are entitled to an administrative appeal pursuant to the Public Safety Officers Procedural Bill of Rights Act. Accordingly, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. CLERB -- General Enactment and Purpose

In 1990, County voters amended their charter to require County board of supervisors to establish CLERB. (S.D. Co. Charter, § 606.) Pursuant to the charter amendment, the board of supervisors enacted County of San Diego Ordinance No. 7880 (N.S.), adding Article XVIII (entitled "Citizens Law Enforcement Review Board") to the County's administrative code. "[CLERB is established] . . . to advise the Board of Supervisors, the Sheriff and the Chief Probation Officer on matters related to the handling of citizen complaints which charge peace officers and custodial officers employed by the County in the Sheriff's Department or the Probation Department with misconduct arising out of the performance of their duties. [CLERB] is also established to receive and investigate specified citizen complaints and investigate deaths arising out of or in connection with activities of peace officers . . . ." (S.D. Co. Admin. Code, § 340.)

CLERB makes (1) findings of misconduct and recommendations for imposition of discipline against individual deputies and also (2) recommendations for changes in policies and procedures of the Sheriff's Department. (S.D. Co. Admin. Code, § 340.9, subds. (c) & (f).) However, "[i]t is the purpose and intent of the Board of Supervisors in constituting [CLERB] that [CLERB] will be advisory only and shall not have any authority to manage or operate the

Sheriff's Department or the Probation Department or direct the activities of any County officers or employees in the Sheriff's Department . . . . [CLERB] shall not decide policies or impose discipline against officers or employees of the County in the Sheriff's Department or the Probation Department." (S.D. Co. Admin. Code, § 340.)

CLERB consists of 11 review board members and a small staff including an executive officer and a special investigator. (S.D. Co. Admin. Code, § 340.2; CLERB Rules & Regs.,[1] §§ 3.1 & 3.9.) CLERB's review board members are County residents appointed by the board of supervisors. (S.D. Co. Admin. Code, § 340.3.) They serve three-year terms, and may not be appointed for more than two consecutive terms. (S.D. Co. Admin. Code, § 340.4.) CLERB's review board members are not compensated, serve at the pleasure of the board of supervisors, and may be removed at any time. (S.D. Co. Admin. Code, §§ 340.5, 340.8.)

2. *CLERB Procedures for Investigating and Making Findings on Citizen Complaints*

The County administrative code authorizes CLERB to prepare and adopt rules and regulations for the conduct of its business, subject to approval by the board of supervisors. (S.D. Co. Admin. Code, § 340.7, subd. (b).)

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1 All references to CLERB Rules and Regulations are to those adopted on March 9, 1992, as revised in April 1994.

These rules and regulations provide for processing and investigating citizen complaints. CLERB transmits copies of all citizen complaints received to the Sheriff or Chief Probation Officer, as appropriate. (CLERB Rules & Regs., § 9.1.) CLERB's executive officer and staff initially screen the complaints, classifying them as appropriate for investigation, deferral, or summary dismissal. (CLERB Rules & Regs., § 9.2(a).) CLERB's entire review board must review and approve the classification before "significant further action" is taken on any complaint. (CLERB Rules & Regs., § 9.2(b).)

In cases where a complaint is approved as appropriate for investigation, CLERB's investigator typically: (1) interviews the complainant, the aggrieved party, each subject officer, and witnesses; (2) examines the scene of the incident; and (3) views and analyzes physical evidence associated with the incident. (CLERB Rules & Regs., § 9.3(a).) The investigator attempts to secure written statements under oath from all participants and witnesses to the alleged incident. (CLERB Rules & Regs., § 9.3(c).)

The investigator prepares a written report, which includes a summary of the investigation along with the information and evidence disclosed by the investigation. (CLERB Rules & Regs., § 9.4.) The report also contains a procedural recommendation by the executive officer to the review board as to whether the case is appropriate for disposition at that time or should be referred

to a three-member panel for an investigative hearing. (CLERB Rules & Regs., § 9.4.)

The investigative report is submitted to CLERB's chairperson, who may attach his or her own recommendation. (CLERB Rules & Regs., § 9.4.) The report is then submitted to the entire CLERB board. (CLERB Rules & Regs., § 9.4.) The chairperson provides the complainants, aggrieved party, and each subject officer with: (1) written notice that the complaint will be considered by CLERB; (2) any recommendations on summary disposition or procedural matters; (3) a copy of the investigative report and summary, along with notification that all statements, records, reports, exhibits, and other file evidence are available on request, except where disclosure is prohibited by law; (4) written notice the parties may consult an attorney if desired who may represent them at any hearings; and (5) a copy of CLERB Rules and Regulations. (CLERB Rules & Regs., § 9.8.)

The complainant, subject officer, CLERB's executive officer, or any member of CLERB's 11-member board may request an investigative hearing for some or all of the allegations of the complaint. (CLERB Rules & Regs., § 10.1.) However, CLERB Rules and Regulations make no provision as to the effect of such a request.

CLERB's entire review board decides whether (1) an investigative hearing should be held, or (2) the entire review

board should review and determine the complaint based on the investigative report and the evidence in the investigative file without a hearing. (CLERB Rules & Regs., § 9.5.) An investigative hearing may be deemed necessary where: (1) there has been an undue lapse of time since the incident; (2) there is additional evidence not disclosed by the investigative report; (3) there is reason to question the findings and conclusion of the investigative report; (4) a hearing would advance public confidence in CLERB's citizen complaint process; or (5) personal appearance by the parties would facilitate CLERB's fact-finding process. (CLERB Rules & Regs., § 10.2.)

In cases where the CLERB board decides to review and determine a citizen complaint based on the investigative report and file evidence *without* an investigative hearing, the entire CLERB board deliberates and prepares a final report which contains findings of fact and overall conclusions as to each allegation of misconduct. (CLERB Rules & Regs., §§ 9.6, 16.6.) If CLERB determines the allegations are proven by a preponderance of the evidence, it sustains findings of misconduct against the subject officer. (CLERB Rules & Regs., §§ 9.6, 14.9.)

The final report adopted by CLERB is forwarded to the board of supervisors, the sheriff or chief probation officer, the complainants, and each subject officer. (CLERB Rules & Regs., § 16.8.) The complainants or subject officers may request the final report be re-opened and reconsidered by CLERB if previously

unknown evidence is discovered that was not available to CLERB and there is a "reasonable likelihood" the new evidence will alter the final report's findings and conclusions. (CLERB Rules & Regs., § 16.9.) Additionally, the board of supervisors or CLERB itself upon its own initiative may re-open a final report when reconsideration is in the public interest. (CLERB Rules & Regs., § 16.9.)

3. CLERB's Reports Against Deputies

Here CLERB sustained findings of misconduct against each of the four appellants arising from three separate incidents. CLERB's findings were based on investigative reports; no hearings were conducted.

On May 9, 1995, CLERB issued its report concerning allegations of misconduct against five officers arising from the February 1992 shooting of Paul Reynolds by Deputy Jeffrey Jackson.[2] CLERB sustained an allegation of misconduct against Deputy Caloca, finding he "committed an act of misconduct when he improperly investigated the Reynolds homicide by asking Deputy Jackson leading questions . . . ." CLERB found Deputy Caloca asked Deputy Jackson questions that suggested answers creating the legal foundation for justifiable use of force.

On December 12, 1995, CLERB issued its report concerning the December 1991 shooting death of Esquiel Tinajero-Vasquez

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[2] Of those five, only Deputy Caloca is a party to this proceeding.

(Tinajero) by Deputy Smith and the investigation of the incident by Deputy Simica. CLERB sustained two findings of misconduct against Deputy Smith, finding (1) his attempt to stop and detain Tinajero was without reasonable cause or legal authority and (2) his use of lethal force was excessive. CLERB sustained one finding of misconduct against Deputy Simica, finding his narrative description, diagram, and report of the crime scene were misleading and incomplete.

On May 14, 1996, CLERB issued its report concerning the October 1994 detention of Robert Thompson and Dennis Webb by California Fish and Game Officer Lieutenant Turner, which occurred in Deputy Cuevas's presence. CLERB sustained three findings of misconduct: (1) Deputy Cuevas acted in a manner inconsistent with the Sheriff's Department's mission and ethics by refusing to prevent Lieutenant Turner from conducting an illegal detainment of Thompson and Webb; (2) Deputy Cuevas failed to safeguard Thompson;[3] and (3) Deputy Cuevas's report contained false or misleading information.

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[3] Thompson alleged he was ordered by Lieutenant Turner to remove his clothes and then stand in his underwear and socks for more than an hour outside a mountain campground in October. Thompson felt the effects of elevation and low temperature, and was visibly shaking; moreover, there were civilians present and Thompson felt embarrassed. Thompson had no other clothing, but the officers left him after nightfall at a 3,700-foot elevation dressed only in a tee shirt, underwear, and socks. Deputy Cuevas has denied the allegations.

In its reports against Deputies, CLERB made general recommendations for policy changes to the Sheriff's Department.[4] Although CLERB sustained findings of serious misconduct against Deputies, the final reports were silent as to recommendations of discipline. CLERB's reports indicate none of the Deputies responded to its investigator's request for a statement or interview.[5]

The San Diego Sheriff's Department investigated the same incidents giving rise to CLERB's reports, and found no misconduct by any of the Deputies.

4. Proceedings Subsequent to CLERB's Findings

In June 1996, counsel for Deputies wrote letters to the Civil Service Commission, requesting it hold liberty interest hearings or alternatively administrative appeals to allow Deputies an opportunity to challenge CLERB's findings. Civil Service Commission denied Deputies' requests.

Deputies and Sheriffs Association filed a petition in superior court seeking a writ of mandate to compel County and Civil Service Commission to conduct: (1) liberty interest

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4 In its report against Deputies Smith and Simica, CLERB recommended the district attorney's office reopen its investigation of Tinajero's death.

5 There is nothing in CLERB's reports suggesting any of the Deputies requested a hearing pursuant to CLERB Rules and Regulations, section 10.1, nor reconsideration of the final report pursuant to section 16.9.

hearings to allow Deputies to clear their names of CLERB's findings, or alternatively (2) administrative appeals pursuant to the Public Safety Officers Procedural Bill of Rights Act on the ground that CLERB's findings of misconduct constitute punitive action.

In support of their petition, Deputies submitted the declaration of Assistant Sheriff Thomas Zoll, who is in charge of the Human Resource Service Bureau for the Sheriff's Department. Zoll stated his department when considering a deputy for advancement "may consider findings and evaluations from other credible agencies or boards," including "credible reports or findings from such sources as . . . a citizens review board." Further, Zoll stated negative findings that a deputy committed an act of misconduct "published by a credible source . . . would be given consideration in personnel decisions, and may have an adverse impact on the career of the deputy . . . [e]ven though the [Sheriff's] department may have investigated the matter and reached a different conclusion . . . ."

The trial court denied Deputies' petition, finding (1) Deputies are not entitled to liberty interest hearings as they failed to show a present deprivation of liberty interests, and (2) Deputies are not entitled to administrative appeals as they failed to show punitive action.

DISCUSSION

"In reviewing the trial court's ruling on a writ of mandate (Code Civ. Proc., § 1085), the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. [Citation.] However, the appellate court may make its own determination when the case involves resolution of questions of law where the facts are undisputed. [Citation.]" (*Saathoff* v. *City of San Diego* (1995) 35 Cal.App.4th 697, 700.) The facts in this case, insofar as they concern the effect of CLERB's findings against Deputies, are undisputed.[6]

I. *Liberty Interest Hearings*

Deputies contend CLERB's findings of serious misconduct have caused them to suffer harm amounting to a deprivation of their Fourteenth Amendment liberty interests in their respective careers. Deputies allege CLERB's findings deprive them from "moving and advancing within the law enforcement profession." Therefore, Deputies claim entitlement to liberty interest hearings to clear their names.

"'The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing

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6 Respondents submitted no evidence which either contradicts or opposes Zoll's declaration.

is paramount.' [Citation.] Thus application of this principle requires a two-step analysis[:] 'We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty or property"; if protected interests are implicated, we must then decide what procedures constitute "due process of law."' [Citation.]" (*Murden* v. *County of Sacramento* (1984) 160 Cal.App.3d 302, 307 (*Murden*).)

We have previously observed "[i]t is well established '[a] person's protected interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. [Citation.] Rather, the liberty interest is infringed only when the defamation is *made in connection with the loss of a government benefit, such as . . . employment.* [Citations.]'" (*Haight* v. *City of San Diego* (1991) 228 Cal.App.3d 413, 418, italics added, quoting *Murden, supra*, 160 Cal.App.3d at p. 308.)

Even serious damage to reputation alone is insufficient to constitute deprivation of a constitutionally protected liberty or property interest -- the action by the government agency must be made in connection with or result in harm to a government benefit. (See, e.g., *Paul* v. *Davis* (1976) 424 U.S. 693, 701, 709-710 [police chief's distribution of flyer listing an individual as "active shoplifter" not a deprivation of liberty or property interest because *damage to reputation alone not*

sufficient to support a claim based on loss of constitutionally protected interest]; *Siegert* v. *Gilley* (1991) 500 U.S. 226, 232-233 [allegedly defamatory statements made by individual's former government employer, *not incident to the individual's termination* from former employer but resulting in loss of a subsequent position with a different employer, insufficient to state a claim for loss of liberty interest against former employer]).

Deputies do not claim, nor is there any evidence in the record on appeal of actual and present impairment to Deputies' positions with the Sheriff's Department -- e.g., there is no claim of demotion, termination, or reduction in salary. Moreover, Deputies admit that the Sheriff's Department investigated Deputies for the same incidents which concerned CLERB's reports and found no misconduct or violation of any Sheriff's Department rules by Deputies.

Instead, Deputies contend CLERB's findings of misconduct deprive them of their liberty interest in "moving and advancing within the law enforcement profession." Deputies argue CLERB's findings "effectively preclude [Deputies] from advancing within the ranks of their current employer, the San Diego County Sheriff's Department, and from gaining employment with other law enforcement agencies."

In support of Deputies' petition for writ of mandate and their contention CLERB's findings effectively "handcuff" them into their current positions, Deputies relied exclusively on the

Zoll declaration. As noted, Zoll declared the Sheriff's Department when making personnel decisions would consider reports by credible sources including citizen-complaint boards, and in cases where a credible source has found misconduct by officers similar to that found by CLERB against Deputies, such findings "may have an adverse impact" on Deputies' careers. Zoll did not state that the Sheriff's Department or any other potential employer has considered CLERB's reports in making personnel decisions or that CLERB's reports have caused present loss or harm to Deputies' positions.

Deputies' assertion that CLERB's findings would effectively lock them into their current positions at most amounts to allegations and evidence of damage to Deputies' professional reputations, which may result in *future* harm such as denial of a promotion. However, damage to reputation alone, even business or professional reputation, is insufficient to show deprivation of a constitutionally protected liberty or property interest. (See *Higginbotham* v. *King* (1997) 54 Cal.App.4th 1040, 1046-1047 [allegedly defamatory statement by a narcotics officer that a surgeon had been cultivating marijuana thereby damaging surgeon's *business reputation and medical practice not sufficient* to constitute deprivation of constitutionally protected liberty or property interests since a person's interest in his *reputation* is neither liberty or property for purposes of the Due Process Clause].)

Although it is clear CLERB's findings of serious misconduct stigmatize Deputies and may well impact their law enforcement careers in the future, we must focus on the absence of evidence in the record showing CLERB's allegedly false findings of misconduct were *made in connection with or have resulted in the loss* of a government benefit. The law requires there not only be government action but also the loss of a government benefit. (*Haight* v. *City of San Diego, supra,* 228 Cal.App.3d at p. 418; *Murden, supra,* 160 Cal.App.3d at p. 308.) Because the record on appeal contains no evidence of an actual loss of a government benefit suffered in connection with CLERB's report, the trial court correctly concluded Deputies were not entitled to liberty interest hearings.[7]

II. *Administrative Appeals*

Deputies assert there is undisputed evidence in the record on appeal showing CLERB's findings of misconduct against them constitute punitive action, thereby entitling them to administrative appeals pursuant to the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). We agree.

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7 Since Deputies have not shown deprivation of a protected liberty interest, we do not reach Deputies' contention CLERB's procedures for investigating and making findings on citizen complaints are inadequate and thus violate their due process rights.

"[T]he Public Safety Officers Procedural Bill of Rights Act provides a catalogue of basic rights and protections which must be afforded all peace officers by the public entities which employ them. [Citation.]" (*Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795, 1805, fn. omitted.)

One such basic protection is that the employing public entity must provide public safety officers the right to an administrative appeal of punitive actions.[8] "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by *any public agency* . . . without providing the public safety officer with an opportunity for administrative appeal." (Gov. Code, § 3304, subd. (b), italics added.) For purposes of the Public Safety Officers Procedural Bill of Rights Act, punitive action is "any action that *may lead to* dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." (Gov. Code, § 3303, italics added.)[9]

Zoll, head of the Sheriff's Department Human Resource Services Bureau, opined the department's promotion process is

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8 "Public safety officers" refers to peace officers, and there is no disagreement that Deputies fall within this category. (See *Howitt* v. *County of Imperial* (1989) 210 Cal.App.3d 312, 314, fn. 3.)

9 The term "public agency" is not defined. The parties do not raise this issue nor do they suggest CLERB is not a "public agency."

extremely competitive, and a single blemish on a deputy's career can prevent him or her from advancing in the department. He also said a report published by a "credible source," sustaining findings of misconduct of a similar nature and severity as those CLERB made against Deputies, would be given consideration in personnel decisions and could have an "adverse impact" on an officer's career. Zoll added that even though the Sheriff's Department may have investigated an incident and reached a different conclusion, the existence of a credible report sustaining this type of misconduct would be considered.

Respondents presented no evidence in opposition to Zoll's declaration. They instead contended that Zoll's declaration does not show the CLERB findings will lead to a "punitive action" because Zoll does not specifically state that the particular CLERB reports at issue are "credible."

Respondents read Zoll's declaration too narrowly. Zoll states that Sheriff Department personnel decisions are made on the basis of the department's own findings and evaluations *and on evaluations of other credible agencies, such as a citizens review board.* Zoll further said that a report published by a credible source asserting the type of misconduct findings that were made against Deputies would be given consideration in personnel decisions and could have an adverse impact on this decision. From these statements, we must necessarily infer that the Sheriff's Department will consider the specific CLERB reports in

making personnel decisions pertaining to the Deputies and that this consideration may lead to an adverse personnel action as defined in Government Code section 3303.

Respondents maintain that the Sheriff's Department would not consider the CLERB reports because the reports contain conclusions inconsistent with the Department's own findings and conclusions. In asserting this argument, respondents fail to recognize CLERB's role in the local governmental structure and its mandated relationship with the Sheriff's Department.

The members of CLERB's review board are county officers (*Dibb* v. *County of San Diego* (1994) 8 Cal.4th 1200, pp. 1212-1213), appointed by the board of supervisors to serve three-year terms. (S.D. Co. Admin. Code, §§ 340.4-340.5.) "The members of the CLERB are delegated the duty to hold hearings, administer oaths and issue subpoenas, all in order to investigate, on behalf of the board of supervisors, complaints about the official conduct of employees of the county sheriff's and probation departments." (*Dibb* v. *County of San Diego, supra*, 8 Cal.4th at p. 1212.)

In light of these functions, it would be improper to conclude that a law enforcement agency will fail to consider reports by a citizens review board -- formed pursuant to a county charter amendment whose members are public officers appointed by and reporting to the board of supervisors. Although CLERB may reach conclusions different from the Sheriff's Department's

findings, these findings have significance in the overall personnel process. As Zoll noted, "the Sheriff's Department does not function in a vacuum. . . . The effectiveness of the department is determined [in] no small degree by the ability of its deputies to be held in high regard by the community and by the agencies and organizations with whom the department interacts on a day to day basis." Because CLERB was specifically created to investigate and make recommendations concerning public complaints about peace officers, it is unrealistic and inappropriate to conclude CLERB reports -- whether positive or negative -- would play no role in personnel decisions. (See 74 Ops.Cal.Atty.Gen. 77, 80 (1991).)

For these same reasons, a CLERB report sustaining a finding of misconduct against an officer cannot be viewed as analogous to a negative job performance review placed in an officer's personnel file, a circumstance our court previously found insufficient to constitute punitive action entitling the subject officer to an administrative appeal. (See *Haight* v. *City of San Diego, supra,* 228 Cal.App.3d at p. 419; *Howitt* v. *County of Imperial, supra,* 210 Cal.App.3d at p. 314.) Unlike an internal performance evaluation, known only to a select number of colleagues, a CLERB report must be sent to the board of supervisors and the sheriff (CLERB Rules & Regs. § 16.8), thus placing it in the public arena and expanding its impact.

As recognized in *Hopson* v. *City of Los Angeles* (1983) 139 Cal.App.3d 347, a negative report by a citizens review board prepared in the aftermath of a highly publicized police shooting of a private citizen and placed in the officer's personnel file is punitive action entitling the officer to an administrative appeal. (See also *Turturici* v. *City of Redwood City* (1987) 190 Cal.App.3d 1447, 1450.) The same is true of the reports issued here where Deputies were found to have engaged in acts of "serious misconduct." We think it of little import that here there is an absence of evidence that CLERB's reports were placed directly in the Deputies' personnel files. Whether formally placed in files, the evidence presented here establishes the reports will be considered in future personnel decisions affecting these deputies and may lead to punitive action. Moreover, given CLERB's reporting obligation and the presumption that an "official duty has been regularly performed," (Evid. Code, § 664), we must presume that CLERB sent its reports against Deputies to both the board of supervisors and the Sheriff.

Having concluded the CLERB reports may impact personnel decisions adversely, we determine the trial court erred in finding there was insufficient evidence of punitive action within the meaning of Government Code section 3303 and Deputies were not entitled to administrative appeals under Government Code section 3304, subdivision (b). Zoll's uncontradicted declaration, in which he opined that a single blemish on a deputy's record could

prevent advancement and the CLERB findings of misconduct were sufficiently serious to have an adverse career impact, constitutes evidence of punitive action for purposes of the Public Safety Officers Procedural Bill of Rights Act.

Although CLERB's reports, findings of serious misconduct, and recommendations for discipline or policy changes are advisory only and CLERB has no authority to directly impose discipline against Deputies, our focus is on whether CLERB's findings of misconduct constitute "punitive action" by a public agency as the term is defined under the Public Safety Officers Procedural Bill of Rights Act. Because CLERB's findings are actions which "may lead" to adverse employment consequences, they are "punitive action[s]" within the meaning of the statute. The statute does not require a showing an adverse employment consequence has occurred or is likely to occur, merely that actions "may lead" to such a consequence. Zoll's unrebutted declaration provides ample evidence of this.

Accordingly, the Civil Service Commission must provide the Deputies an opportunity for an administrative appeal of CLERB's findings against them. "[T]he procedural details for implementing the provisions for an administrative appeal are to be formulated by the local agency." (*Browning* v. *Block* (1985)

175 Cal.App.3d 423, 429; see also *Binkley* v. *City of Long Beach*, *supra*, 16 Cal.App.4th at pp. 1806-1807.)[10]

DISPOSITION

Judgment is reversed. The trial court is directed to issue a writ of mandate directing the Civil Service Commission to conduct an administrative hearing under Government Code section 3304, subdivision (b). Respondents to bear costs on appeal.

CERTIFIED FOR PUBLICATION

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P.J.

NARES, J.

10 The parties do not contest that the Civil Service Commission is the appropriate body to hear administrative appeals brought pursuant to Government Code section 3304, subdivision (b).

DECLARATION OF SERVICE

State of California
County of Sacramento

I am at all times herein mentioned, over the age of eighteen years, and not a party to nor interested in the within matter. I am employed by DMG-MAXIMUS, INC. My business address is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841, County of Sacramento, State of California.

That on the 6th day of August, 1999, I served the Comments to Draft Staff Analysis dated July 6, 1999 by Claimant, City of Sacramento, CMS 4499, Peace Officers Procedural Bill of Rights on the interested parties by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United State mail at Sacramento, California, addressed as set forth in the Attachment 1, attached hereto and incorporated herein by reference.

That I am readily familiar with the business practice of DMG-MAXIMUS, INC. for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United State mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 6th day of August, 1999 at Sacramento, California.

Declarant

EXHIBIT L

STATE OF CALIFORNIA

PETE WILSON, Governor

DEPARTMENT OF FINANCE
91[illegible] STREET
[illegible] MENTO, CA 95814-3706

LATE FILING

August 12, 1999

ITEM 2

Ms. Paula Higashi
Executive Director
Commission on State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814

Dear Ms. Higashi:

In conjunction with the staff of the State Personnel Board, we have reviewed the Draft Staff Analysis concerning the reimbursement of costs mandated by the "Peace Officer Procedural Bill of Rights (POBOR)," CSM-4499, which was submitted by the City of Sacramento. As the result of that review, we have concluded that while the analysis accurately identifies some activities that constitute reimbursable state mandates POBOR does not extend as far as suggested by the Draft Staff Analysis. Department of Finance and State Personnel Board staff agree that all of the activities included in Items 2 and 3 of that Analysis are reimbursable. We do, however, both believe that portions of Items 1, 4, and 5 do not constitute reimbursable state mandates because either the activity is not required by POBOR with respect to non-permanent employees or the activity is already mandated by due process and/or current law.

We question the following comments designated in the Draft Staff Analysis as reimbursable:

Item 1:
Providing the opportunity for an administrative appeal for the following disciplinary actions (Government Code section 3304, subdivision (b)):

- Discipline (as defined) received by probationary and at-will employees

Government Code Section 3304(b) provides: "(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal." (emphasis added) Thus, POBOR does not require such appeals for probationary and at-will employees.[1]

[1] Whether other POBOR protections apart from the right to an appeal, are to be accorded employees who do not have permanent status may be more of an open question given differences in statutory language. To the extent due process applies only where employees have a property or liberty interest, an argument can be made that other POBOR rights that are co-extensive with due process protections (e.g. right to materials upon which a disciplinary action is based, right to notice and opportunity to be heard) may also be mandated by POBOR only for those

- Transfer of permanent employees for the purposes of punishment.

Peace officers transferred for purposes of punishment may already have the right to an administrative appeal under due process law, case law or statute. (See Ramallo SPB Dec. No. 95-19).

Item 4:
Producing transcribed copies of any notes made by a stenographer at an interrogation, and reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer in the following circumstances when the investigation results in (Government Code section 3303, subdivision (g)):

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest is not affected.
- A transfer of a permanent employee for the purposes of punishment.

When an investigation results in disciplinary action, a peace officer is entitled to all of the materials upon which the action is based under the Skelly decision. State civil service probationary employees are also entitled to Skelly rights by State Personnel Board rule. Other materials are generally discoverable, at least under the law governing state civil service employees. Thus, once discipline has been initiated, the peace officer is generally entitled to request and receive transcribed copies of stenographer notes and reports and complaints made by investigators or other persons, except those deemed confidential. These situations would not constitute a reimbursable state mandate program.

Item 5:
Performing the following activities upon receipt of an adverse comment (Government Code sections 3305 and 3306):
Pertaining to: School Districts, Counties, and Cities and Special Districts

In reference to points (a), (b), and (c), each step is considered beyond what is required by due process. If the adverse comment can be considered a "written reprimand," however, the POBOR required "notice" and the "opportunity to respond," may already be required by due process. The extent of due process due an employee who suffers an official reprimand is not entirely clear.

We and the staff of the State Personnel Board intend to attend the Commission's scheduled August 26 hearing on this claim, and will be available to respond to any questions regarding this letter.

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employees who have passed probation or who can demonstrate a deprivation of a liberty interest. Other laws may accord probationary employees greater rights, however.

If you have any questions regarding this letter, please contact Don Rascon, Principal Program Budget Analyst at (916) 445-8913 or James Apps, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

J. W. Miller for

S. CALVIN SMITH
Program Budget Manager

PROOF OF SERVICE

Test Claim Name: PEACE OFFICER PROCEDURAL RIGHTS
Test Claim Number: CSM-4499

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 8 Floor, Sacramento, CA 95814.

On August 12, 1999, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814
Facsimile No. 445-0278

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: William Ashby
3301 C Street, Room 500
Sacramento, CA 95816

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

League of California Cities
Attention: Ernie Silva
1400 K Street
Sacramento, CA 95815

Mr. Steve Smith, CEO
Mandated Cost Systems
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Sacramento, CA 95825

Mr. Walter Vaughn, Executive Officer
State Personnel Board
801 Capitol Mall, Room 570
Sacramento, CA 95814

Wellhouse and Associates
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DMG-MAXIMUS
Attention: Allan Burdick
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Mr. Edward J. Takach
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Mr. Michael Vigliota, Paralegal
Santa Ana Police Department
City Attorney's Office
60 Civic Center Plaza
Santa Ana, CA 92702

Mr. Paige Vorhies (B-8), Bureau Chief
State Controller's Office
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 12, 1999 at Sacramento, California.

Abby Shawhan

ITEM 2

EXHIBIT M
LATE FILING

CALIFORNIA STATE PERSONNEL BOARD

801 Capitol Mall • Sacramento, California 95814

August 13, 1999

EXHIBIT M

RECEIVED
AUG 16 1999
COMMISSION ON
STATE MANDATES

Commission on State Mandates
1300 I street Suite 950
Sacramento, CA 95814

Re: CSM 4499
Test Claim of City of Sacramento
Public Safety Officers Procedural Bill of Rights

Dear Ms. Higachi:

Pursuant to the request of the Department of Finance, I am enclosing seven (7) copies of the State Personnel Board's precedential decision in Gregory R. Ramallo (1995) SPB No. 95-19. The decision is cited on page 2 of the August 9, 1999 letter from the Department of Finance on this subject.

Sincerely,

Elise S. Rose

Elise S. Rose
Chief Counsel

Cc: Joe Shinstock
Department of Finance

enclosures

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **GREGORY R. RAMALLO** From three working days' suspension and administrative reassignment as a State Traffic Officer in the Inland Division, Department of California Highway Patrol	SPB Case No. 34669 **BOARD DECISION** (Precedential) **NO. 95-19** December 5-6, 1995

Appearances: Burton C. Jacobson, Attorney, on behalf of appellant Gregory R. Ramallo; Daniel E. Lungren, Attorney General, by Thomas Sheerer, Deputy Attorney General on behalf of respondent, California Highway Patrol.

Before: Lorrie Ward, President; Floss Bos, Vice President; Richard Carpenter and Alice Stoner, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the attached Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Gregory R. Ramallo (appellant or Ramallo) from his three (3) day suspension and administrative reassignment from his position as a State Traffic Officer in the Inland Division, Department of California Highway Patrol (Department). At the time of this adverse action, appellant was a State Traffic Officer working as an aircraft pilot, a position designated as a Specialty Pay Position.

After a hearing, the ALJ sustained without modification appellant's three day suspension but rescinded appellant's

amallo continued)

Administrative Reassignment on grounds that such disciplinary transfers are prohibited by Government Code § 19994.3.[1] After a review of the entire record, including the transcript, exhibits, and the written arguments of the parties, the Board adopts the ALJ's Proposed Decision to the extent it is consistent with the discussion below.

We agree that appellant's three day suspension should be sustained. We disagree, however, with the ALJ's interpretation of section 19994.3 and find that section 19994.3 does not prohibit disciplinary transfers. Although we find that disciplinary transfers are not unlawful per se, we do not believe that pellant's misconduct should result in permanent reassignment and order that appellant's reassignment be limited to a period of 12 months after which appellant is to be returned to his Specialty Pay Pilot position.

ISSUES

1. Does Government Code § 19994.3 prohibit disciplinary transfers?
2. What is the appropriate penalty under all the circumstances?

[1]Hereinafter all code citations will be to the Government Code unless specifically stated otherwise.

(Ramallo continued)

DISCUSSION

The appointing power has the right to transfer employees between positions within the same class. Government Code § 19994.1 provides, in pertinent part:

> An appointing power may transfer any employee under his or her jurisdiction: (a) to another position in the same class; or (b) from one location to another whether in the same position, or in a different position as specified above in (a) or in Section 19050.5.[2]

The appointing power's right to transfer is, upon protest, initially subject to review by the Department of Personnel Administration (DPA) as provided in section 19994.3:

> (a) If a transfer is protested to the [Department of Personnel Administration (DPA)] by an employee as made for the purpose of harassing or disciplining the employee, the appointing power may require the employee to transfer pending approval or disapproval of the transfer by [DPA]. If [DPA] disapproves the transfer, the employee shall be returned to his or her former position, shall be paid the regular travel allowance for the period of time he or she was away from his or her original headquarters, and his or her moving costs both from and back to the original headquarters shall be paid in accordance with the department rules.

Neither section 19994.3, nor the statutes defining discipline preclude a department from transferring an employee as a means of discipline.[3] Section 19570 defines adverse action to mean

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[2]Government Code § 19050.5 allows appointing powers to transfer between classes if the Board has designated the transfer as appropriate.

[3]The Board expresses no opinion on the policy question of whether a transfer should be made for disciplinary purposes.

"dismissal, demotion, suspension, or other disciplinary action" (emphasis added). The Board has found that when an employee is reassigned for disciplinary purposes, the reassignment falls within the meaning of "other disciplinary action." Carol DeHart SPB Dec. No. 94-22, p.5. A disciplinary transfer, like any adverse action, triggers a number of rights including, but not limited to, the right to notice (section 19574), the right to inspect documents (section 19574.1), and the right to a hearing before the SPB (section 19578).

The purpose of section 19994.3 is to prevent a Department from transferring an employee for disciplinary reasons without affording the employee the panoply of rights triggered by the adverse action process. Whether a transfer is disciplinary in nature is a question of fact.

Even when a reassignment is related to a disciplinary action, the reassignment is not necessarily disciplinary in nature. For example, in Orange County Employees Association v. County of Orange (1988) 205 Cal.App.3d 1289, an employee was written up for a lack of thoroughness and later criticized for poor management style. When the employee was transferred, the employee appealed on grounds that his transfer was punitive.[4] The court declined to find that

[4]Orange County did not interpret Government Code § 19994.3 but, instead, Government Code § 3303 which prohibits punitive transfers of peace officers.

(Ramallo continued)

the transfer was punitive, stating:

> Deficiencies in performance are a fact of life. Right hand hitters sit on the bench against certain pitchers, some professors write better than they lecture, some judges are more temperamental with criminal cases than others. The manager, chancellor or presiding jurist must attempt to find a proper role for his personnel. Switching Casey from shortstop to second base because he can't throw to first as fast as Jones is not in and of itself a punitive transfer. (Id. at 1294.)

The court found "there is a difference between a transfer to punish for a deficiency in performance, versus a transfer to compensate for a deficiency in performance." Id. (emphasis added). Put another way, an employer has a right to place the right person in the right position.

In cases in which the appointing power has not indicated that the transfer was disciplinary, the employee who suspects his or her transfer was disciplinary in nature may protest the transfer or reassignment to DPA for evaluation. If DPA finds the transfer was, in fact, punitive in nature, DPA disapproves the transfer and the employee is returned to his or her original position.[5] As discussed below, the appointing power may thereafter pursue the transfer as a disciplinary measure by serving a Notice of Adverse Action as in other disciplinary cases. If DPA approves the transfer, i.e., finds that the transfer was not punitive in nature,

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[5]DPA does not have jurisdiction to hear appeals from disciplinary transfers. The SPB is the state agency designated by the California Constitution to review disciplinary actions, (California Constitution, Article VII, section 3(a)).

the employee remains in the position to which he or she has been transferred.

In this case, however, the Department purposely designated the reassignment as disciplinary in nature. The Notice of Administrative Reassignment was attached to the Notice of Adverse Action and specifically stated that the reassignment was being taken based on appellant's "propensity to abuse [his] position as an aircraft pilot, misuse State resources and flagrantly disobey the policies and procedures of the Department." The Notice of Administrative Reassignment informed appellant of his right to appeal to the State Personnel Board. Thus, appellant's reassignment was clearly for disciplinary purposes and falls within the meaning of "other disciplinary action."

Where, as here, a transfer is openly designated as a disciplinary transfer, the employee may appeal directly to the SPB.

PENALTY

Having determined that the permanent disciplinary transfer in this case was not per se unlawful, we now turn to the question of whether it was an appropriate penalty under all the circumstances. When performing its constitutional responsibility to review disciplinary actions [Cal. Const. Art. VII, section 3(a)], the Board is charged with rendering a decision which is "just and proper". (Section 19582). In determining what is a "just and proper" penalty for a particular offense, under a given set of

(Ramallo continued)

circumstances, the Board has broad discretion. (See Wylie v. State Personnel Board (1949) 93 Cal.App.2d 838.) The Board's discretion, however, is not unlimited. In the seminal case of Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court noted:

> While the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion which is, in the circumstances, judicial discretion. (Citations) 15 Cal.3d at 217-218.

In exercising its judicial discretion in such a way as to render a decision that is "just and proper," the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly as follows:

> ...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Id.)

Appellant's misconduct consisted of removing his Departmental weapon and placing it on a chair next to him in an airport restaurant; removing the magazine from his weapon and allowing a private citizen to inspect it; twirling his PR-24 baton and throwing it to the ground to demonstrate how to trip a fleeing suspect; excessively testing his siren on one occasion; using his aircraft's public address system to make a joking comment to a

riend; failing on a few occasions to immediately notify dispatch f his location; failing to properly secure his aircraft during a eal break at the Hesperia Airport; and increasing power over a riend's house to get his friend's attention.[6] As noted above, we agree with the ALJ that this misconduct warrants the three day suspension taken by the Department. The remaining issue is whether appellant's misconduct also warrants a permanent disciplinary transfer.

Some of the particular misconduct in which appellant engaged is conduct directly related to his specialty pay position as a ot. Appellant used his state aircraft's public address system nd siren in a frivolous manner. While flying over his friend's ouse, appellant powered up his state aircraft to get his friend's attention. These incidents of misconduct would not have occurred had appellant not been a CHP pilot. As appellant's supervisor noted at the hearing, as a pilot, appellant works in a "non-structured unit" that is, for the most part, unsupervised. Consequently, good judgment is imperative.

On the other hand, the ALJ found appellant to be a good pilot, stating that there was no evidence that appellant was not fully capable of continuing to work in his assignment as a pilot. In evaluating appellant's misconduct, appellant's supervisor found

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[6]The ALJ did not find any impropriety in appellant's practicing short takeoffs or revving his engine.

(Ramallo continued)

that the most egregious error made by appellant was removing the magazine from his weapon and allowing private citizens to inspect it. While the totality of appellant's misconduct which specifically relates to his pilot position shows poor judgment, it was not so egregious as to justify permanent removal from the pilot position. Consequently, we limit appellant's Administrative Reassignment to 12 months. We believe that reassignment for one year should impress appellant with the necessity of taking his pilot duties more seriously.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The ALJ's attached proposed decision is adopted to the extent it is consistent with this Decision;

2. The three day suspension taken by the Department of California Highway Patrol is sustained but the permanent Administrative Reassignment from a Specialty Pay Position is modified to a period of 12 months.

3. The Department of California Highway Patrol is ordered to pay appellant all back pay and benefits which would have accrued to him had he been Administratively Reassigned for 12 months rather than permanently reassigned.

4. This matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either

party in the event the parties are unable to agree as to the salary and benefits due appellant.

5. This opinion is certified for publication as a Precedential Decision (Government Code § 19582.5).

THE STATE PERSONNEL BOARD*

Lorrie Ward, President
Floss Bos, Vice President
Richard Carpenter, Member
Alice Stoner, Member**

*Member Ron Alvarado was not present when this decision was adopted and therefore did not participate in this decision.

Member Alice Stoner concurring in part and dissenting in part:

I concur with the Board's decision to sustain appellant's three day suspension but I dissent from the Board's decision to reassign appellant for 12 months. I would completely rescind appellant's Administrative Reassignment.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on December 5-6, 1995.

C. Lance Barnett, Ph.D.
Executive Officer
State Personnel Board

PUBLIC HEARING

COMMISSION ON STATE MANDATES

---oOo---

ORIGINAL

TIME: 9:45 a.m.
DATE: August 26, 1999
PLACE: State Capitol, Room 437
Sacramento, California

---oOo---

REPORTER'S TRANSCRIPT OF PROCEEDINGS

---oOo---

Reported By: STACEY L. HEFFERNAN CSR, RPR
No. 10750

All those in favor indicate with "aye."

(Affirmative Response by Several Commission Members.)

CHAIRPERSON PORINI: Opposed?

(No audible response.)

CHAIRPERSON PORINI: All right. That whittles down our agenda significantly.

MS. HIGASHI: This brings us to Item 2, which is the test claim hearing on the Peace Officers Procedural Bill of Rights.

Camille Shelton, of our staff, will present this item.

MS. SHELTON: Good morning.

This is a test claim filed by the City of Sacramento. The test claim legislation provides procedural protection to peace officers employed by local agencies and school districts when a peace officer is interrogated by the employer is facing punitive action or receives an adverse comment.

All parties agree that the test claim legislation imposes some of the notice and hearing protections to employees that are required by the due process clause of the United States and California Constitution.

The Commission has required staff to analyze this connection between a due process clause and a test claim legislation in order to determine that the activities required by the test claim legislation constituted a new program or a higher level of service and to determine whether those activities impose costs mandated by the state; however,

the parties dispute how far the due process clause goes and when the requirements of the test claim legislation kicks in.

The main issues in dispute are bulleted on pages A-2 and A-3 in the Executive Summary. Staff recommends that the Commission approve the test claim for the activities identified on pages A-3 through A-6 of the staff analysis.

Will the parties please state their names for the record.

MS. STONE: My name is Pamela Stone. I'm here on behalf of the City of Sacramento.

MS. CONTRERAS: Dee Contreras, Director of Labor Relations for the City of Sacramento.

MR. TAKACH: Edward Takach, T-a-k-a-c-h, Labor Relations Officer of the City of Sacramento.

MR. BURDICK: Allan Burdick on behalf of the California Cities' SB 90 Service.

MS. STEIN: I'm Elizabeth Stein. I'm staff counsel representing the State Personnel Board.

MR. SHINSTOCK: Joseph Shinstock representing the Department of Finance.

MR. APPS: Jim Apps with the Department of Finance.

CHAIRPERSON PORINI: All right.

Do we need to do any swearing in of our witnesses?

MS. HIGASHI: Yes, we do.

Will all of the witnesses please raise their right hand:

Do you solemnly swear or affirm that the testimony which you're about to give to the Commission is true and

correct based upon your personal knowledge, information or belief?

(Unanimous affirmative response by the witnesses.)

MS. HIGASHI: Thank you.

MS. STEIN: Good morning Madam Chairman, Members of the Commission. Our presentation is going to start with Ms. Dee Contreras, who is the Director of Labor Relations for the City of Sacramento; and we're all available here to answer any questions your Commission may have.

CHAIRPERSON PORINI: Thank you.

MS. CONTRERAS: By way of background, I've been involved with labor relations for the city for a little over nine years and I've been director for the past four. Before that, I was a labor relations representative, and I was the person assigned to the police department, so I was involved with police discipline matters and intimately involved with the activities that are involved with POBOR here.

And Ed is my senior staff, who is currently assigned to the police department, who has been dealing with them since I left and also has a background in law enforcement, having been a police officer himself in the past, so he is also familiar with and has been representing both employees and the management side, in terms of police departments, for in excess of ten years now.

The City of Sacramento is not a particularly large jurisdiction, as the state goes, but we do have a relatively active Internal Affairs Department, processing somewhere in the neighborhood of 80 cases a year and performing hundreds

of Internal Affairs' interviews a year. So the impact of this legislation, if it has any impact at all in the I.A. process, is substantial, when you start looking at that.

As a small department, we generally have three sergeants who are assigned to Internal Affairs. And we're talking about hundreds of interviews, so the impact on people and their jobs is substantial. And we actually implement 40 or more police disciplines a year.

We can have active years in which one complaint -- one complaint resulted in 67 disciplines related to that specific, single case. So when we say 80 cases, that doesn't mean 80 people are involved, it could be significantly more than that, who wind up being reviewed in the course of that process.

It's important to distinguish the things that are required by Skelly and due process, and we recognize that those things exist outside of the requirements of POBOR, but they first require a property interest in the job. The reason the public employer has those mandates and those requirements is because when public employment, when it is career or permanent or whatever the title the entity gives it, is given to people, it is presumed that a property right attaches to it and that employment will continue unless something serious happens. And then, because we are a public jurisdiction, we are required to give them due process in order to allow them to defend their property interest in their job.

By definition, that means employees with no property

interest don't have those rights. And, yet, POBOR mandates those rights, in terms of all sworn police officers. So all sworn peace officers is what the statute uses.

POBOR -- excuse me, Skelly and due process require a fact-finding investigation, always a good practice, notice and opportunity to the person who is being disciplined, if they are disciplined. There is no requirement to provide information to an employee who, as a result of an investigation, is not disciplined, but there are situations in which POBOR requires, in fact, that they be given information that would not otherwise be -- they would not otherwise be entitled to.

Skelly does not apply, as I said, to probationary and at-will employees, and it does not arise for reprimands or suspensions of short duration. The Skelly case itself involved a termination, but, as you know, decisions like that are reinterpreted by the courts regularly. And there are cases that indicate, for example, suspensions of five and possibly even 10 days do not require the same protections as does Skelly. So there's some question as to where those rights arise.

In the City of Sacramento, letters of reprimand do not require that we provide information to the employee. They don't get a Skelly package in the city. We don't issue an intent letter. In normal discipline, under Skelly, you issue an intent letter that says, "This is what we're going to do. You have a Skelly hearing, which is a review process, an informal review, prior to the implementation of final

discipline."

And, the city, we then issue a separate, final discipline letter that varies by jurisdiction. But, in the local entities, when you talk about what the impact this has on cities, counties, local jurisdictions, agencies, JPAs, Joint Powers Agencies/Administrations, those are all public entities, there are hundreds, perhaps thousands, of them in the State of California that are impacted by this, if they have peace officers working in those jurisdictions, as do most cities and counties.

As a practical matter, it doesn't apply for us, in terms of reprimands, absent POBOR, and POBOR creates some greater rights in those areas. There's no obligation, in a normal interview, to notify the person of what it is you're investigating. We can call in, and do, miscellaneous employees in the City of Sacramento and begin an investigation, a fact-finding process, without telling them what it is, what the complaint is, what it is we're looking for, what it is we're going after.

You can't do that with peace officers. You have to notify them what it is you're investigating, what the complaint is about. It becomes complicated, because, if you give them the name of the complainant, you create other problems as you go through this process.

So, as you can see, it's much more sensitive and creates a greater burden. It substantially increases the burdens on the local government, in terms of the right to know, the nature and area of the investigation. It also

hampers the investigative process, because, when you give a person information before that you get -- before you are allowed to interrogate them, it allows them an opportunity to create, reflect or refresh facts that might have come out differently in a straightforward investigation where they didn't know what it is you were looking for or at.

There's a limitation on the number of interrogators you can have with the employee at a given time, which can impact your investigation and can make a difference, in terms of the kinds of questioning that goes on.

They have a right to a transcript of a prior interview before there's an additional interview. That can -- if you are interviewing a large number of people and you reinterview the employee after you've interviewed intervening witnesses, that that means if you are taping you have to, in essence, re-transcribe the process. And I'll talk about taping a little bit more in a second.

They have a right of review for at-will employees. POBOR creates protections up to the level of the Chief of Police. I'm not sure that, when the Legislature did this, they intended to protect Chiefs of Police in the City of Sacramento.

Our current police chief, for example, who never worked as a civil service employee in the City, has no right, whatsoever, to return to any other classification and is an at-will employee. By that, in the normal context of law in the State of California, he can be released for any reason or no reason, as long as it's not an illegal reason, and that's

the end of his employment.

On the other hand, he has POBOR rights which gives him substantially greater rights than he would have as an at-will employee. In fact, in a major dispute with some employees who may, some day, be managers, their biggest concern is: They want a definition of an administrative review process that will be mandated for POBOR managers, should they become managers, because they know what their civil protections are.

And it's been an interesting struggle to try and deal with them on that issue, because this right is so sacrosanct with them, that they're not willing to give it up; and they see it as an integral part of their ongoing job rights. And we've tried to deal with that in a variety of ways, but the practical matter is: There is an impact of this statute, and the impact flows, in terms of what we're required to do.

There are impacts beyond discipline in that it affects transfers, whether or not there's a financial impact from the transfer. We have no such thing in the City as disciplinary transfers. They don't exist under the civil service rules; they don't exist in any other process.

But, if we discipline somebody and also transfer them from their assignment, we are now in a position where we are compelled to treat that as if it is discipline and to, in essence, give them some sort of a third-party neutral review of the transfer, the same as if it were a normal discipline.

In fact, in the latest incident of that, we treated

it as if it was part of the discipline process instead of separating them out, because the city attorney was very concerned that we would wind up in a situation where we would have quite a bit of litigation over what POBOR rights are. The law says "punitive transfers," but what's a punitive transfer is in the eye of the beholder.

I received this morning -- apparently, you've received a DPA case, which has no precedential value, by the way, at the local government level, that says that a transfer is in the eyes of the beholder, an employee -- if this is an issue of fact. Well, an issue of fact, where you have no process, means you have to litigate all those issues. That's a burden that is difficult for the employer, and, again, exists only because of this statute.

Employees often see operational moves as punitive. If they don't like the reorganization of the department, if they don't like going to neighborhood policing, if they believe going to neighborhood policing requires a 75-percent increase in the number of police officers in the city, as remarkably not our association did, then they don't see, when you do it, that it isn't punitive when you start assigning people. Those become struggles on a day-to-day basis that should not occur and do occur because of the impact of this.

Probationary employees have a review right that goes beyond a liberty interest. A liberty interest arises when the employer releases somebody on probation for reasons that basically impugn, in a significant way, their character such that they would have difficulty getting another job. If

I released you for dishonesty or theft, for example, that would apply.

In the City, we don't ever release anybody for any stated reason. We have a letter which says, "You're being released because you failed to meet the requirements of the position during the probationary period. Thank you very much. Have a happy life. Love, Dee." That's basically what the letter says. And the unions regularly object to it.

As I said at the beginning of this, we have very strong language in our city charter regarding our rights during probation, and we don't intend to, in any way, reduce them; however, we regularly have a review of probationary officers who fail as police officers. And probably, based on recollection, 80 or 90 percent of them actually come through and request a review and discussion of the basis for it, and they go over all the documents that were in their file.

It creates an obligation for us to document and justify our decision-making process during probation, which is unnecessary, and, in fact, is in conflict with the concept of probation, to have to defend that decision at the end of the line, particularly given the kind of language we have in our charter.

The right to tape creates an obligation on the agency to, in fact, tape interviews. And I know that it can be argued that it doesn't; however, let me try and articulate the problem you face, in reality, as a local jurisdiction.

In the State of California, you don't have the right to tape somebody without their permission. So, in essence,

with every employee, except sworn peace officers, we can say, "No, you can't tape this interview. Take notes." And we take notes and they take notes. And -- or we can tape and they don't have to have a copy of it, but, if we transcribe it and do discipline, certainly we would give them that copy, but we take notes and they take notes.

If the employee comes in and tapes, and, trust me, they all come in and tape, if they're sworn peace officers, their attorneys come in with tapes. You wind up with two tape recorders on a desk. If they tape and we do not, then they have a record that we do not have or we must rely on a tape created by the employee we are investigating. That would not be a wise choice, from the employer's perspective.

If we take notes and they tape, our notes are never going to be exactly the same as the tape is going to be if it's transcribed, so we wind up with what is arguably an inferior record to the record that they have.

So it is essentially -- it says they may tape but the practical application of that is: For everybody who comes in with a tape recorder to tape, which is virtually every peace officer, we then must tape. And, if we tape, we, then, if we're going to reinterview, transcribe.

In the case that I discussed earlier, which everybody agrees is an anomaly, one complaint we had -- 200?

MR. TAKACH: 240.

MS. CONTRERAS: 240 people were interviewed in the course of one investigation and 67 disciplines flowed from it. You can imagine the complication of going back and

reinterviewing people when you have 240 sets of transcripts to transcribe in order to get information you needed before you could reinterview those people as they went.

Some people who were intimately involved in the problem, in that particular case, you only had to give them their transcript at that point in time, but, in order to ask questions about other people's transcripts or questions or statements, and to be clear and specific and fair to the employee, you basically had to do that. We had transcribers basically running 24 hours a day trying to keep up with the taping process in that interviewing parade that came out of that one complaint.

So it's not that we can tape or we choose to tape. I think anybody who's ever presented a case in front of an arbitrator would acknowledge that we must tape if the employee does. Otherwise, we go to a hearing with a record that is inferior to the record that the employee has.

In the local government, POBOR also requires a right to respond to adverse documents. And, while that sounds simple, it creates an obligation to process, file and maintain those responses and attach them to the correct document and make sure they get into the file. Generally, it also requires some administrate review and to discuss the response of the employee.

I have seen responses to documents in which the employee wrote pages and pages and pages of information and/or questions. And so it requires a substantial amount of time to respond to that. That doesn't exist anywhere except

here.

Reprimands in the City are the most common form of discipline. They are probably 25 to 35 percent of what we do in any given year. The fact that we have to provide an administrator to review for those is an additional burden. The fact that we have to maintain the kinds of recordkeeping that are involved in presenting that information is a substantially greater burden than what we have otherwise.

We realize that there are a variety of impacts on local government that are raised by the discipline process as it exists without POBOR. And you have to do, for example, what's compelled, in terms of your own rules, and that varies from organizations.

As I said, we don't have disciplinary transfers. I'm sure there are many jurisdictions where the Civil Service Rules includes those things. You know, reprimands used to be covered by the Civil Service Rules in the City of Sacramento. They were negotiated out, in terms of dealing with the union, so that they don't -- are no longer covered by it.

In many jurisdictions that I've dealt with in the past, reprimands are not considered formal discipline, at all, even written reprimands. Those are activities that the local entity is allowed and should be allowed to decide. And the impact of this legislation is that we are required to provide additional rights to people, and that necessitates -- of necessity impacts staff, time, documentation and recordkeeping for all of those things.

So to the extent that the staff recommendation

acknowledges the additional burden placed on local government, by that, we would concur. I still have concerns that the at-will peace is not recognized in its totality, because, again, our police chief is a good example.

Our Civil Service Rules give every other police manager in the city -- in fact, if we were going to terminate them, the right to revert to the bargaining unit, they basically leave their exempt employment, go back to their last civil service status and then we fire them. So it's kind of a two-step process.

Under the Civil Service Rules, they carry some sort of historical perspective, and that's true of all employees. I've never worked at the city as a civil service employee, so I don't have that protection. Somebody in my position who did, who came up through the ranks that had been in civil service previously, would, in fact, be able to revert back and have a hearing at that point.

But, in fact, they are all at-will employees. And, short of termination, they have, under our system, no right to appeal a discipline or to respond or to address discipline because they have no property interest in their management jobs. And, yet, POBOR gives them that.

So I add that as an additional concern beyond the staff recommendation. But we appreciate very much the work that the staff did, in the fact that they waded through what is, what I think, very arcane, difficult law that only somebody who has to deal with every day can appreciate, found that, in fact, the burden on cities, counties, and school

districts is substantial and does exist such that it's a mandate from the State.

Thank you very much.

CHAIRPERSON PORINI: All right. Questions?

Next witness.

MR. TAKACH: No, not yet.

CHAIRPERSON PORINI: All right. Then should we go with the Department?

MS. STEIN: I just have a few brief comments. I'm Elizabeth Stein representing the State Personnel Board. We addressed our comments in the letter to the staff. I'm just going to address a few things.

First, as far as the City of Sacramento's comments to the staff, we believe that written reprimands are entitled to due process protections, that the state laws give those protections to people who receive written reprimands, mostly because of the Stanton case, Stanton v. State Personnel Board; and staff addressed that case.

And, in that case, there is clear language that due process protections -- that due process rights are covered by POBOR and that POBOR is consummate with the due process protections. And staff cites that case, and we agree with staff's analysis.

As far as the tape recordings, as a practical matter I can see the problems that local governments have, having to provide tape recordings for those interrogations, but I think, as a matter of law, if it was litigated, they would probably lose on that issue, because, as staff also points

out in their analysis, the case law says that if it's not a mandated activity, something that local government may do, that they are not entitled to reimbursement.

As far as things that we brought up in our letter, the State Personnel Board, there's only two things, at this point, I'd address. One is: I understand that the Commission just looks at the legislation, POBOR, as it existed when the test claim came up, but I think it's inherently wrong if you don't recognize the amendment to the statute.

Courts, as a matter of course, will take judicial notice of changes in the laws. And, right now, as of December '98, there is no mandate by the State, under POBOR, to give these appeal process rights to probationary -- to people who have not passed probation, permanent employees; and to not recognize that, I think, would be wrong. It'll come out at some point, I would imagine, if the test claim is either amended, but it just seems that the Commission should be able to recognize that and provide that the State is no longer required to provide reimbursement for probationary employees after December '98 when it was amended.

The other concern would be: If you go back and you try and sort out which probationary employees who've been disciplined have been disciplined for things involving liberty rights, who's going to make that determination? It's usually a determination made by courts and judges.

So, if you go back and seek reimbursement for an appeal process that a probationary employee enjoyed because

of POBOR, you'd have to look at whether or not a liberty interest was involved, because this is something stigmatizing a reputation, because those people who are fired because of something that will stigmatize their reputation are still, as a matter of due process, entitled to an appeal process. So that's just another thing I think the staff should -- the Commission should look at when dealing with that issue.

As far as the disciplinary transfer cases, I don't think the law is as clear as the City contends. There are many jurisdictions. The State, all the time, has cases of transfers that are clearly designated as disciplinary. And, in those cases, the State does provide for due process protections.

And we think the Runyon case and the Howell case cited by the staff in their analysis are not clear, saying that disciplinary transfers -- people that are transferred for disciplinary reasons are not entitled to due process rights. We think that there's a real question that, perhaps, they are. And the State has recognized that in its own precedential decisions.

That's all I have right now.

CHAIRPERSON PORINI: Questions? Department of Finance, do you --

MR. APPS: No. We have nothing, really, to add at this point.

CHAIRPERSON PORINI: All right.

MS. STEINMEIER: I do have something. I would like to ask staff to address, particularly, the last comment by

Mrs. Stein about the due process rights, particularly as they relate to transfers.

Do we have something in the analysis or would you like to --

MS. SHELTON: We've addressed that on page A-11, in the second and third paragraphs. Basically, it's in your binder or -- I don't think it's going to be in the blue volume.

MR. BURDICK: Okay.

MS. SHELTON: We found two cases dealing with -- discussing transfers. One was the Runyon case. And, in that case, the peace officer did receive a transfer plus an accompanying reduction in pay. And, in that case, the court did find that the officer was entitled to due process protection.

We could not find any cases where the officer was just transferred alone, without any accompanying reduction in pay or reduction of classification, or anything like that. There was always something tied to the transfer.

The one, as Ms. Stein pointed out, we did find was that Howell case. And, in that Howell case, the court does state that: "An employee enjoys no right to continuation in a particular job assignment." So, from that language, we interpreted that an employee, a permanent employee, does not have due process rights for a pure transfer; and that POBOR, in that case, would go beyond and constitute a new program, if it's just a pure transfer.

CHAIRPERSON PORINI: Any other response?

MS. STEIN: My response to that would be that Runyon did involve the reduction in pay, in addition, but it's our opinion that the disciplinary transfer, itself, is certainly as harsh as a written reprimand, which is entitled to due process, that staff acknowledges. And if -- the court didn't say that -- it was just silent, as to the issue of a disciplinary transfer alone.

As far as Howell, it dealt with the issue of a good cause for a late filing. And they never made the determination that the transfer was, in fact, disciplinary in nature. It was going back to the lower court to figure that out, so I do not think that the case law prohibits due process rights for a disciplinary transfer.

The State has recognized those rights for its employees and believes that -- it's still an open question. I think if a court was to address it, that the court would come down on the side of giving due process protection to those people, because it's discipline in nature. It's certainly as harmful to one's reputation in the file as a written reprimand, which does provide for due process protections.

CHAIRPERSON PORINI: All right. Mr. Beltrami?

MR. BELTRAMI: Ms. Stein, how would you respond to the point that was made in the instance of the Chief of Police, for instance?

MS. STEIN: Well, I suppose it depends on the -- the Chief of Police, if they're a permanent employee, is entitled to the same due process protection.

MR. BELTRAMI: Well, he's an at-will employee. He works for the County. Council should have the right to terminate without any reason, at all.

MS. STEIN: Well, we did not address that issue, and, so, in the State, there's been a court case that CEAs, which are sort of the state equivalent, the Career Executive Assignments, do not enjoy due process rights.

MR. BELTRAMI: We're familiar with that.

MS. STEIN: I'm sure you are.

So we would concede, probably, that they don't enjoy that, at least the Personnel Board, because that has been litigated on a state issue, on a similar sort of issue.

MR. BELTRAMI: Ms. Contreras, I thought that the Personnel Board made an interesting argument, and, that is, that this is really good for you because it tightens up things so well, and, therefore, it's going to save you money in the long run rather than cost you money.

Would you comment on that?

MS. CONTRERAS: We were discussing that issue in the hallway. It's funny you should ask. And I said that, "To the extent anybody thinks that this law, in particular, or that legislation, in general, creates harmony and improves processes, they are naive in the extreme."

In fact, the amount of hostility and fighting that goes on about issues like whether or not you can transfer people, whether or not you have the right number of people in an interview room, whether or not you get transcripts soon enough, we're having a struggle right now in the City of

Sacramento.

The initial contact process with Internal Affairs is what we call the blue sheet. It's mimeoed on blue paper. You know what the complaint is, who the officer is, who it involves, what the substance of the complaint is. And it used to be a way of introducing the employee to the investigation.

When they came in, we basically gave them the blue sheet. We showed it to them. They couldn't take it or copy it or anything, but they could look at. And then we got into fights with counsel for the employees about whether or not the blue sheet said what the questions they were asking related to, or, "Who was the person who filled it out? Well, who wrote that? Who filled that out? There's two handwritings on this piece of paper." So we stopped showing them the blue sheet.

And now we're in the middle of what will -- what could very well wind up in arbitration, the issue of whether we changed our practice by now reading the blue sheet to them but not showing it to them so they don't get to see the handwriting. That blue sheet exists because of POBOR. I mean, we struggled continuously about whether the employees' perception of whether they are getting all the rights that they're entitled to, to say nothing of the fact that the law itself has continued to expand.

At one point, what was required was some sort of administrative review of the process. Now, our unions believe that everything we do is subject to third-party

neutral review. We have to arbitrate everything. They want to take it through civil service or to an outside binding arbitration process or to court. So, no, it hasn't created good will or a tighter process or help the relationship in any way.

I think legislation rarely does that. But, in this case, it has served to do exactly the opposite. It is a weapon used by employees and their union against the employer, and it's a continuous threat, in terms of whether or not we're going to comply. We rarely -- I'll be honest with you, we rarely are threatened by it; and we have been in court more than once with employees who've decided that they didn't like the way we were doing business and they were going to take us to court. And, typically, we prevail because we do what is required of us, but, no, it hasn't helped the process. Thank you.

Thank you for asking.

MS. STEINMEIER: I have a comment.

CHAIRPERSON PORINI: Yes, Ms. Steinmeier.

MS. STEINMEIER: There are some parallels between peace officers and teachers that I'm hearing through your -- school districts have this problem with teachers, so I understand. And I know the laws were designed to protect, and sometimes maybe overprotect, and I do appreciate the staff analysis. It does not create a happy situation. In fact, it creates a contentious situation. And I have empathy for that. So I do agree with most of the staff analysis.

On the question of taping, we have a standard, here,

about reasonableness. Even if the law says "may," if it's almost required by the nature of doing business in this case, if the employee tapes, the employer must. I mean, you can't end up not having your own record, so I would be inclined to agree with the claimant on the taping issue.

The other one on written reprimand is not as clear to me. I guess I buy the argument that it is a due process. Anytime you put something in someone's personnel file that is negative about them, regardless of state law, I think that the constitution does imply, if not actually require you, to allow them to know what it is and to respond to it, if they want to. So I don't see the first one as being -- the one on written reprimand as being something that flows from the state law. I think it flows from the Federal Constitution.

But, on taping, I don't know how the rest of you feel, but I'm compelled to believe that it's a requirement, even if the law says "may."

MS. STONE: Madam Chairman, I'd like to address the -- this is on the issue of written reprimands. When you're addressing the issue of written reprimands, you have to take a look at what's required under POBOR and compare that with what is required when you're not dealing with a peace officer employee.

In my prior incarnation, I was responsible for disciplining both miscellaneous that were civil service, as well as attorneys that were at-will, and it was like herding cats. I don't know how else to explain it. When you're

issuing the written reprimand, there is no requirement that the individual be given the right to respond or make any comments to it, at law.

In fact, the Stanton case, I'd like to -- in your materials at page 311, it goes through and does an analysis. And I know that Ms. Shelton disagreed with me and that's fine. It goes through and does an analysis of what is required for written reprimands under POBOR.

First from the standpoint of procedural due process, and, in this particular matter, if you'll notice on page 311, it's about the fourth paragraph down on the left-hand side, the court says: "As the city notes, no authority supports plaintiffs,'" that would be the employees, "underlying assertion that the issuance of written reprimand triggers due process. Said parts outlined in Skelly."

And it goes on and says here, "Skelly applies in all these certain situations." And, on the bottom, it says, "We find no authority mandating adherence to Skelly when a written reprimand is issued." And then it goes on to say, "By the way, you've got protections for written reprimands under POBOR," and that it went through and did an analysis to ascertain whether, in this instance, the administrative procedures, under POBOR, were sufficient for a written reprimand. So it's very clear to us, and, in no other circumstance, does a written reprimand rise to the level of the Skelly. It is only with POBOR that the individual employee has a right and ability to comment.

I note that the State Personnel Board has made other

mentions about what their particular practices are; however, what the State has voluntarily chosen to do with respect to its employees is separate and apart from what the constitution requires, because that's what we're looking at, so that's our concern with respect to written reprimands.

If this particular Skelly-type requirement would be imposed on every miscellaneous employee, it -- or nonsafety members, the amount of work that would be required would be phenomenal. Then, for example, Skelly does not necessarily cover suspensions of less than five days. Well, if it doesn't cover a suspension of less than five days, a written reprimand, which is much less on the hierarchy of discipline, should also not be covered.

CHAIRPERSON PORINI: Other questions? Mr. Foulkes.

MR. FOULKES: I don't know if this is for staff or for the folks from Sacramento, but the issue of written reprimand versus, as in the staff recommendation, "adverse comment," and what is the difference between those and how does that play into this? Because we had some concerns in reviewing that. Perhaps, the word choice was --

MS. SHELTON: That's a good point. We discussed that amongst staff, too. The language in the statute says "adverse comment" and it doesn't tie it back to a written reprimand. But I would imagine in practice, and maybe Ms. Contreras can address your question a lot better than I can, that there are times when an adverse comment equates to a written reprimand. I would imagine that to be true. You might ask the parties about that.

And that's why we clarified in the staff analysis, that, even in those cases where it does, if it does equate to a written reprimand, we found that with written reprimands due process would actually apply. So, in those cases, you would have a limited -- the activities would be -- the reimbursable activities would be limited to just the two.

CHAIRPERSON PORINI: Comment?

MR. TAKACH: Yes. The City of Sacramento, the Police Department, issues something lower than a written reprimand called a documented counseling, which remains in an officer's file generally for a -- it's called a watch file, generally for a period of a year until they move to another assignment.

We believe that there's a right to respond to that comment under the law. Now, written reprimand is above that, which remains in their file through our own practices as formal discipline, but they have the right to respond, even to that adverse document, which is a documented counseling of you spent too much time at a coffee break. I mean, it can be that simple. They get the right to respond to it because it's in their file.

MS. CONTRERAS: Let me play on that. Watch file means shift file not watch this person's file. For those of you who are not familiar with police terms, there were three watches and that means shifts, so the watch file is not a warning file about a bad person; it is basically the supervisor's working file, typically, is what a watch file amounts to. It doesn't become part of their permanent

personnel file. In fact, they're purged regularly.

MR. TAKACH: We have one challenge under POBOR that an adverse comment -- which was a complaint by either a departmental employee or a citizen which generated an Internal Affairs' complaint which did not result in discipline. There was a transfer but was rescinded, so there was no adverse action taken to the employee, other than there was this complaint in an Internal Affairs' file, not his personnel file, as stated in other pieces of statute. But there was -- the challenge to that, just being in the Internal Affairs' file, to want to get that out or to respond to that.

MS. CONTRERAS: Let me comment on that. That case went to court; and the union's perspective was that he had a right to -- what the employee sought was the complaining document which was written by a superior officer. And in what, from our prospective, amounted to a personal angry response to the person who filed the document, since no discipline was forthcoming. He believed that it was done, you know, on an individual, personal basis maliciously, and so we wound up in court on that case.

Now, the judge chose -- did not issue a TRO, chose not to -- basically told the parties that they should go settle this, because there is no case law that extends where they were going. But, again, based on the language of POBOR, under a normal circumstance, that would have been a, "Yeah, right. So what?" kind of response, but we wound up in front of a judge.

We settled the case reading onto the record a settlement proposal we tried to make, but that settlement basically reinstated some of the employee's rights because there was no subsequent investigation -- I mean, no discipline out of the investigation. We would have gone there anyway, but we had to resolve it in court rather than doing it in the normal course of events because of POBOR. Their belief that that complaint -- not anything that was ever in his personnel file, the fact that somebody had complained about him, we investigated it and took no action based on it, was sufficient to generate POBOR, right to review under the documents.

MS. STONE: Madam Chairman, there's also some materials in the response to the draft staff analysis that talk about how, if there is citizen review boards that do an investigation and come up with findings that do not necessarily lead to discipline, the courts have found that those findings of citizen review boards, in jurisdictions which have them, can constitute an adverse comment even though there is no discipline intended by it, and, therefore, the officer is entitled to respond to these particular filings which just exist and are not necessarily included in their personnel file.

CHAIRPERSON PORINI: All right.

Ms. Stein?

MS. STEIN: Yes. I just wanted to add, if it's helpful, that the state system designates reprimands as discipline, and you have all these informal types of

discipline, counseling memorandums are often referred to or informal discussion memorandums, you know, citing different behaviors that occur.

But if it's titled a reprimand, if a state calls it an official reprimand, then it becomes discipline. It requires notice under the Skelly provisions, and that's how the state differentiates it, and it sounds like the local governments do something similar. No?

MS. SHELTON: I thought I heard the city say something a little bit different. The way staff wrote the analysis was identical to what Ms. Stein was just saying. And I think what the city is saying, and correct me if I'm wrong, is they see it as two different steps: One, an adverse comment, and that that does result in something else, like, whatever, another disciplinary action, and then they go through whatever steps are required at that stage. So, if they're duplicative, they're duplicative.

Is that correct?

MS. CONTRERAS: Yeah, I think it can. And the right to respond exists to things much less than formal discipline.

CHAIRPERSON PORINI: Yes.

MR. BELTRAMI: Camille, what about the comment that Ms. Stein made about the amendment of December '98? Does that take the probationary focus out of the system?

MS. SHELTON: It does affect -- yes, as of January 1st, 1999, but, until that time, they're included. The amendment was made in 1998 and became effective January 1,

1999, so, up until that date, probationary and at-will employees were entitled to administrative appeal until December 31st, 1998.

MR BELTRAMI: Thank you.

CHAIRPERSON PORINI: All right.

Yes, Mr. Foulkes.

MR. FOULKES: One last one. In the language that talks about providing prior notice to peace officers regarding the nature of the investigation, correct me if I'm wrong, but isn't that required now, not prior notice but subsequent notice?

And the question is: If you have to give the notice and the timing is changing but the notice isn't changing, is that adding additional duties or not?

MS. SHELTON: Are you talking about what the receipt of a written reprimand is?

MR. FOULKES: Um --

MS. SHELTON: Or what page?

MR. FOULKES: Yeah. I'm talking about page A-29, No. 3, under the staff recommendations.

MS. SHELTON: You're talking about the third activity under the conclusion and staff recommendation?

MR. FOULKES: Right.

MS. SHELTON: Staff found that that was a new program or higher level of service because notice is required before any disciplinary action is -- I mean, misconduct is charged, so it's notice prior. I mean, this is a requirement before they even get into the due process rights.

MR. FOULKES: Okay. So that they would still be required to send the notice after?

MS. SHELTON: If it results in disciplinary -- if the interrogation results in a disciplinary action, right.

MR. FOULKES: Okay.

MS. CONTRERAS: I think that notice refers to what I call the blue sheet. We have to tell them, at the commencement of an investigative interview, why we're talking to them, as opposed to the normal process where you just start talking to them and asking them questions about where they were yesterday.

I mean, if the complaint is that -- you have to say, you know, "There's been a complaint that you were parked outside the city limits." So then -- and, normally, you'd say, you know, "Where were you on Wednesday the 21st? Where were you yesterday? Where did you go here? Where did you go there?" You can ask all kinds of questions.

And, if they never get outside the city limits, then you can say, "Gee, why, in that case, did the city manager see you park at a liquor store in West Sacramento last Tuesday at about 11:00?" And then they go, "Oh, gee. I must have forgotten that part."

So, in the case of the police officer, he knows at the beginning that you saw his squad car parked at the 7-11 in West Sacramento, so it changes the texture of the investigation. And it is an additional burden.

MR. BELTRAMI: Don't you do joint work with West Sacramento?

MS. CONTRERAS: How do you think that we know that they're there? Call the city manager's office, report to the 7-11.

MS. GOMES: I have a question about that, when you say that that creates a higher burden by them knowing what's going to be happening during the investigation.

Could you explain how did that create a higher burden?

MS. CONTRERAS: Well, in many cases, it can change the way you handle an investigation, and it can impact the amount of information you have to have before you get there. Typically, we get a complaint. We interview whoever the complainant is and any witnesses they may identify, and then you basically talk to the employee and confront them with information that you've received in most cases; but it changes the nature of the questioning that you have to do and the amount of information you have to have ahead of time in order to be absolutely certain of what your facts are, because the employee is going to know where you're going before you get into the interview.

He reads the blue sheet, talks to his attorney and comes in with a defense, so you have to have a substantially greater amount of information in order to get to where you need to be. Most investigations are not as easy as, "Where were you at 11:00 o'clock yesterday?" They tend to be complex, and many of them relate to things like tactics.

So knowing ahead of time where we're going means we have to have a lot more information in order to get an

effective case investigation and obtain a result that gives us, what we believe, to be the reality of the situation.

CHAIRPERSON PORINI: All right. Thank you.

Mr. Beltrami.

MR. BELTRAMI: Camille, why did we break it down by the type of entity, why do we have something for county, something for school districts?

MS. SHELTON: The reason I did that --

MR. BELTRAMI: Yes.

MS. SHELTON: -- was because POBOR does apply to peace officers employed by local agencies and school districts. Unfortunately, in this situation, there were prior statutory schemes related to adverse comments that were different for school districts and county and special districts and cities, and so that's why I broke that down, because the prior law was different for each type of entity, which made it very confusing.

CHAIRPERSON PORINI: All right. Other questions or comments?

MR. BURDICK: If I can just make one comment, and that is: I think this has been helpful, the discussion today. And one of the things we talked about is that if you agree with staff recommendation, and hopefully with the amendments that are recommended by local government, or with or without them, we think that the step next is obviously Parameters and Guidelines, to sit down and kind of negotiate and discuss these things, where we're going to, for the first time, really have an opportunity to sit down with both sides,

state agencies, as well, and with Camille, to go through these things and sort them out.

I think that some of these issues that now are unclear can be clarified at that point and then staff can probably come back and hopefully we can all reach an agreement, but, if there aren't, we could probably narrow them down to fewer items and be a little more specific.

As you can see, it's an extremely complex issue but that's one of the problems, sometimes, as we go into there, this process becomes a little bit adversarial in the sense of people sending documents back and forth. We did have an opportunity to sit down, and we did request an initial meeting, but, unfortunately, until after the hearing, it seems like, very often, sometimes the state agency people feel a little reserved, at least it's my perception they feel a little reserved, about what they might want to comment on, in the sense that they may say something -- that they may agree to something that is mandated that maybe they shouldn't have agreed to, or whatever. I would hope that, as we move along, that if there are areas that you're not clear, that you just leave those on the table to be dealt with at the Parameter and Guideline process.

MS. SHELTON: Can I comment on that?

CHAIRPERSON PORINI: Please.

MS. SHELTON: I agree that the activities described in the Parameters and Guidelines are going to be far more detailed than what is provided in the staff analysis, but the activities that are listed in the staff analysis are required

to be analyzed by the Commission to first determine if there's a reimbursable state-mandated activity.

The issue, with regard to written reprimands, you need to make a finding on that today to determine whether or not that's going to be included as a reimbursable state-mandated activity. I don't think you can leave that to the Parameter and Guideline stage.

What you can leave to the Parameter and Guideline stage would be how much activity do you want to give them to determine whether or not a transfer is punitive? I mean, those types of questions can come at the Parameter and Guideline stage, but this language in here is directly from the statute. I would not recommend leaving these issues for the Parameter and Guideline stage.

CHAIRPERSON PORINI: All right.

MS. SHELTON: But the scope and the extent, those types of issues may be left to the Parameter and Guideline stage.

MR. BURDICK: Just a comment. I think there's a question of what is proper to do. I think you can do -- leave them if you want. You have the discretion to do that. I don't think that -- and I'd like to clarify. I don't think Camille is saying you can't do it; I think she's saying you probably shouldn't do it, or staff wouldn't recommend it.

But, I guess, that is also an issue where we've dealt with -- or we haven't had a lot of clarity on, and this might be a good time to get some clarity, although maybe not with two brand new members today, although Michael has been

here once before, but that, I think, is an important issue, whether or not things of that nature can, because they are going to come back to you in the Parameter and Guideline process.

CHAIRPERSON PORINI: Camille.

MS. SHELTON: Let me just mention the fact that these activities listed in here are critical to determine whether a new program or higher level of service exists and whether there are costs mandated by the state. Those are test claim issues not Parameters and Guidelines issues.

CHAIRPERSON PORINI: Ms. Steinmeier.

MS. STEINMEIER: I would like to move the staff analysis with the addition of the activities of providing tape recordings of interrogations. That isn't -- there is something about a tape recording here, but producing the transcripts sometimes with a tape recording, and that isn't in the staff analysis or the staff recommendation, so, with that addition, I would like to move it.

MR. BELTRAMI: Second.

CHAIRPERSON PORINI: All right. We have a motion and a second.

May we have role call?

MS. HIGASHI: Mr. Beltrami.

MR. BELTRAMI: Yes.

MS. HIGASHI: Ms. Gomes.

MS. GOMES: Yes.

MS. HIGASHI: Mr. Foulkes.

MR. FOULKES: Yes.

MINUTES
COMMISSION ON STATE MANDATES
Thursday, August 26, 1999
State Capitol, Room 437
Sacramento, California

Present: Chairperson Annette Porini
Representative of the Director of the Department of Finance
Vice Chair Bruce Van Houten
Representative of the State Treasurer
Member Millicent Gomes
Representative of the Director of the Office of Planning and Research
Member Michael Foulkes
Representative of the State Controller
Member Albert Beltrami
Public Member
Member Joann Steinmeier
Representative of School Boards

I. CALL TO ORDER AND ROLL CALL

Chairperson Porini called the meeting to order at 9:15 a.m.

II. CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTION 11126.

Pending Litigation

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

- *Carmel Valley Fire Protection District et al.* v. *State of California et al.*, Case Number S078828, California Supreme Court.
- *County of San Bernardino* v. *State of California, et al.*, Case Number SCV52190, in the Superior Court of the State of California, County of Los Angeles.
- *Gary D. Hori* v. *Commission on State Mandates, et al.*, Case Number 99AS01517, in the Superior Court of the State of California, County of Sacramento.
- *Goff* v. *Commission on State Mandates, County of Sacramento et al.*, remanded to Superior Court by the Court of Appeal, Third District, Case Number 95CS01215. (Re: County of Sacramento's First SB 1033 Application.)

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

- Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

The Commission met in closed executive session from 9:15 a.m. to 9:45 a.m.

III. REPORT FROM CLOSED EXECUTIVE SESSION

At 9:45 a.m., Chairperson Porini reported that, as noticed under Section II of the Notice and Agenda, the Commission met in closed executive session pursuant to Government Code section 11126 to confer with and receive advice from legal counsel for consideration and action as necessary and appropriate upon pending litigation listed on the published notice and agenda.

IV. APPROVAL OF MINUTES (action)

Item 1 July 29, 1999

Upon motion by Member Steinmeier and second by Member Gomes, the minutes were adopted unanimously. Member Van Houten abstained.

V. PROPOSED CONSENT CALENDAR

The Consent Calendar consisted of Items 3, 4, 6, 7, and 8. Upon motion by Member Beltrami and second by Member Steinmeier, the Consent Calendar was adopted unanimously.

VI. HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7

A. TEST CLAIM (action)

Item 2 *Peace Officers Procedural Bill of Rights* – CSM-4499
City of Sacramento, Claimant
Statutes of 1976, Chapter 465
Statutes of 1978, Chapters 775, 1173, 1174, 1178
Statutes of 1979, Chapter 405
Statutes of 1980, Chapter 1367
Statutes of 1982, Chapter 944
Statutes of 1983, Chapter 964
Statutes of 1989, Chapter 1165
Statutes of 1990, Chapter 675

Camille Shelton of Commission staff introduced this item. She noted that this test claim legislation, the Peace Officers Procedural Bill of Rights (POBOR), provides procedural protection to peace officers employed by local agencies and school districts when a peace officer is interrogated by the employee, is facing punitive action, or receives an adverse comment. All parties agree that the test claim legislation imposes some of the notice and hearing protections to employees required by the due process clause of the United States and California Constitutions. The Commission staff analyzed the due process clause and the test claim legislation to determine if the activities required by the legislation constitute a new

program or higher level of service and if those activities impose costs mandated by the state. The parties dispute the staff's analysis regarding the extent that the procedural protections are already covered under the due process clause and when the requirements of the test claim legislation kick in.

Parties were represented as follows: Pamela Stone, Dee Contreras, Director of Labor Relations, and Edward Takach, Labor Relations Officer, all for the City of Sacramento; Allan Burdick for California Cities' SB 90 Service; Elizabeth Stein, Staff Counsel for the State Personnel Board; and, Joseph Shinstock and Jim Apps for the Department of Finance. The witnesses were sworn in.

Ms. Contreras provided detailed testimony of the effects of the legislation on the City of Sacramento. She explained that, in the State of California, with the exception of peace officers, you do not have the right to tape somebody without their permission. If a police officer, and his/her attorney, decides to tape an interview and the City does not, they have a record that the City does not have, or the City must rely on a tape made by the employee it is investigating. (Ms. Contreras submitted that *all* police officers being interviewed tape the session.) If the City takes notes rather than tapes, its record will be inferior. Before reinterviewing an employee, the city is required to transcribe the tapes and provide the employee with a copy. She submitted that the test claim legislation requires the City to provide additional rights to people, which impacts staff, time, documentation, and record-keeping for all of those activities.

Ms. Contreras concurred with staff's recommendation to the extent that it acknowledges the additional burden placed on local government, but was still concerned that the issue of at-will employees is not recognized in its totality. In other words, under the City's system, at-will employees have no right to appeal or respond to discipline because they have no property interest in their management jobs. However, the test claim legislation gives them that right.

Ms. Stein submitted the following:

- In *Stanton* v. *State Personnel Board*, there is clear language that due process rights are covered by POBOR and that POBOR is consummate with due process protections. On this point, Ms. Stein agreed with staff's analysis.
- Though she understood the problems local governments have regarding tape recordings, Ms. Stein noted that case law says that if the activity is not mandated, it is not reimbursable.
- Ms. Stein disagreed with staff's consideration of POBOR as it existed when the test claim was enacted and submitted that it was inherently wrong not to recognize the amendment to the statute, which limits the right to an administrative appeal to public safety officers who have successfully completed the probationary period.
- Regarding disciplinary transfer cases, Ms. Stein submitted that the State regularly has cases of transfers clearly designated as disciplinary. In those cases, the State does provide due process protections.

Ms. Shelton explained staff's interpretation of the *Runyon* and *Howell* cases relating to due process rights for transfers. Ms. Stein disagreed with staff's analysis.

Member Beltrami thought the Personnel Board made an interesting argument that the City should like this legislation because it tightens up things and should therefore save money in the long run. Ms. Contreras responded that, "To the extent anybody thinks that this law, in particular, or that legislation, in general, creates harmony and improves processes, they are naïve in the extreme."

Member Steinmeier agreed with most of staff's analysis. However, even if the law says "may", she submitted that taping is required by the nature of doing business—the employer must have its own record if the employee tapes. Regarding the issue on written reprimands, Member Steinmeier submitted that it flows from the Federal Constitution. Ms. Stone disagreed.

In response to Member Foulkes, the parties explained the distinction between "adverse comment" and "written reprimand." Ms. Shelton clarified that, in its analysis, staff acknowledged two different steps: The first step is an adverse comment, and if that results in another disciplinary action, then the next steps required for that stage are followed. These steps may be duplicative.

In response to Member Beltrami, Ms. Shelton explained that the 1998 amendment regarding administrative appeals became effective on January 1, 1999. However, probationary and at-will employees were entitled to an administrative appeal until December 31, 1998.

Member Foulkes asked whether additional duties were being added regarding the notice of interrogation. Ms. Shelton replied that staff found that was a new program or higher level of service since notice is required *before* any misconduct is charged. This is a requirement before they even get into due process rights. If the interrogation results in a disciplinary action, the employer would still be required to send another notice for the disciplinary action.

In response to Member Gomes, Ms. Contreras explained how a higher burden is created by the notice of interrogation since the employee knows what is going to be happening during the investigation.

Ms. Shelton explained to Member Beltrami that staff broke down its analysis on adverse comments by entity because prior law was different for each type of entity.

Mr. Burdick expressed his hope that, if any areas are unclear, they can be left on the table to be dealt with during the parameters and guidelines. Ms. Shelton agreed that the activities in the parameters and guidelines will be more detailed, but the activities in staff's analysis are required to be analyzed by the Commission to first determine if there is a reimbursable state mandated program. She noted that the issue regarding written reprimands needs to be determined today, though the questions on scope and extent could be left to the parameters and guidelines. Mr. Burdick submitted that the Commission could leave those questions if they wanted to. Ms. Shelton disagreed.

Member Steinmeier moved staff's recommendation, with the additional finding that the activity of tape recording the interrogation when the employee records the interrogation constitutes a reimbursable state mandated activity. Member Beltrami seconded the motion. The motion passed 5-1, with the Chair voting "No."

B. ADOPTION OF PROPOSED STATEMENT OF DECISION (action)

Item 3 *Annual Parent Notification - Staff Development* - CSM-97-TC-24
Irvine Unified School District, Claimant
Education Code Section 48980
Statutes of 1997, Chapter 929

This item was adopted on consent.

VII. INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8.

A. ADOPTION OF PARAMETERS AND GUIDELINES (action)

Item 4 *Very High Fire Hazard Severity Zones* - CSM-97-TC-13
City of Redding, Claimant
Government Code Sections 51175 through 51189
Health and Safety Code Sections 13108.5 & 13132.7
Statutes of 1992, Chapter 1188
Statutes of 1994, Chapter 843
Statutes of 1995, Chapter 333

This item was adopted on consent.

B. REQUESTS TO AMEND PARAMETERS AND GUIDELINES (action)

Item 5 *Mandate Reimbursement Process – Amendment*
CSM-4485-PGA-98-01
Statutes of 1975, Chapter 486
Statutes of 1984, Chapter 1459
Statutes of 1995, Chapter 303 (Budget Act of 1995)
Statutes of 1996, Chapter 162 (Budget Act of 1996)
Statutes of 1997, Chapter 282 (Budget Act of 1997)
Statutes of 1998, Chapter 324 (Budget Act of 1998)
Statutes of 1999, Chapter 50 (Budget Act of 1999)

Piper Rodrian of Commission staff introduced this item. These parameters and guidelines allow claimants to seek reimbursement for costs incurred during the mandate process. The original parameters and guidelines were adopted in 1986. Since 1995, staff has updated them annually to include the language in that year's Budget Act. Ms. Rodrian noted that the Education Mandated Cost Network (EMCN) and California State Association of Counties (CSAC) requested further amendment to include reimbursement for participation in workshops, rulemaking proceedings, and similar Commission business. Staff disagreed because these activities are not required, nor are they tied to the resolution of a successful test claim.

Parties were represented as follows: Leonard Kaye for the County of Los Angeles; Carol Berg for EMCN; Allan Burdick for CSAC; Marcia Faulkner for San Bernardino County; and, Jim Cunningham for San Diego Unified School District.

Mr. Burdick explained that claimants and representatives often participate in workshops or proceedings to give input from local government to assist the Commission in improving or

developing processes. Though these workshops are not tied to specific claims, Mr. Burdick contended that participation should be included as part of the mandate process.

Ms. Berg alleged that participation in such proceedings fits under the section entitled, "Scope of the Mandate." From the current parameters and guidelines, she cited the sentences reading, "Locals cannot be made whole unless these things are included," and "Since local costs would not have been incurred for test claims and reimbursement claims but for the implementation of state imposed mandates, all resulting costs are recoverable." Ms. Berg further noted that this request is not new—training was added as a reimbursable activity.

Mr. Kaye submitted that participation in workshops and proceedings should fall under training because they are designed to assist claimants in identifying and correctly preparing state-required documentation. He noted that the parameters and guidelines do not contain a specific exclusion.

Member Gomes commented that "similar business" seems somewhat vague and asked for clarification from claimants. Mr. Burdick and Ms. Berg explained that they included that phrase so that, if the Commission says "special meeting," or some term other than "workshop" or "rulemaking proceeding," it would be clear to the State Controller's Office that participation is still reimbursable.

Ms. Higashi explained that the term "workshop" is typically used to define a session that is informal in nature and all interested parties are invited to attend. In response to Member Gomes, she noted that participation is voluntary.

Mr. Cunningham disagreed that participation is voluntary. He submitted that many times the subject matter is critical to claimants' constitutional rights to reimbursement.

Ms. Steinmeier encouraged claimants to participate. She warned the Commission that, if claimants are not reimbursed, the Commission might get a skewed representation at workshops. In other words, smaller districts may not be able to afford it, or claimants further away from Sacramento may not show because it imposes more of a cost (travel, accommodations). She noted that claimants are reimbursed for training to understand the mandate reimbursement process, so this request is not much of a stretch. She thought the Commission should consider it as a possible addition.

Ms. Faulkner submitted that participation is critical to her ability to pursue successful test claims and reimbursement claims. She believed that the parameters and guidelines workshops, though not tied to specific claims, have resulted in savings for everyone. Ms. Faulkner contended that, though technically optional, if claimants fail to participate in the process, they could be punished in the form of having their test claims or reimbursement claims denied.

Mr. Cunningham submitted that this is just an interpretation of the test claim finding in the parameters and guidelines, so there is a legal basis for this action.

Member Gomes agreed with Member Steinmeier, though she wanted "similar business" eliminated.

Member Foulkes agreed with staff's analysis. He noted that sometimes Commision staff might be pressured by the claimants to hold a workshop. Down the road, the Commission may be in

a difficult position as to having to define whether a workshop is for required purposes or just because people want to have a meeting.

Mr. Burdick clarified that claimants are not trying to be reimbursed for participation in the legislative process. Rather, they are trying to get reimbursement for the implementation of statutes that are in place.

Ms. Higashi suggested adding reimbursement for "workshops convened by the Commission" under the "Training" section.

Member Steinmeier noted that it might not be appropriate to include rulemaking proceedings because any interested person has a right to attend.

Ms. Higashi suggested continuing the item to the next hearing. Mr. Cunningham and Ms. Berg agreed. However, Mr. Cunningham submitted that rulemaking proceedings should be included. The Chair said that might be pushing too far. She directed staff to work on the language and bring it back next month.

Item 6 *Custody of Minors-Child Abduction and Recovery* - CSM-98-PGA-4237-11
(Civil Code Sections 4600.1, 4604, 5157, 5160, and 5169)
Family Code Sections 3060 to 3064, 3130 to 3134.5, 3408, 3411, and 3421
Penal Code Sections 277, 278, and 278.5
Welfare and Institutions Code Section 11478.5
Statutes of 1976, Chapter 1399

This item was adopted on consent.

C. ADOPTION OF STATEWIDE COST ESTIMATES (action)

Item 7 *Domestic Violence Treatment Services – Authorization and Case Management* - CSM-96-281-01
County of Los Angeles, Claimant
Penal Code Section 273.5, Subdivisions (e), (f), (g), (h) and (i)
Penal Code Sections 1000.93, 1000.94 and 1000.95
Penal Code Section 1203.097
Statutes of 1992, Chapters 183 and 184
Statutes of 1994, Chapter 28X
Statutes of 1995, Chapter 641

This item was adopted on consent.

Item 8 *Airport Land Use Commissions/Plans* - CSM 4507
County of San Bernardino, Claimant
Public Utilities Code Sections 21670 and 21670.1
Statutes of 1994, Chapter 644
Statutes of 1995, Chapters 66 and 91

This item was adopted on consent.

VIII. EXECUTIVE DIRECTOR'S REPORT

Item 9 Proposed Policy on Ethics Orientation (action)

Paula Higashi introduced this item, explaining that the Legislature recently enacted a new law requiring state agencies to offer an orientation course on ethics statutes and regulations governing the conduct of state officials. The orientation consists of viewing the specified training video or Internet documents and a list of statutory conflicts of interest imposed on state officials, if applicable. The requirement must be completed by the end of this year and applies only to Commission Members, the Executive Director, and Chief Legal Counsel.

Since the Commission is their appointing authority, Ms. Higashi requested the Members adopt the proposed Incompatible Activities Statement, applicable to the Executive Director and Chief Legal Counsel, and modeled after the Attorney General's office.

Member Beltrami questioned a few of the items on the list. Ms. Jorgensen replied that it is part of the state law and cannot be changed without statutory amendment. Ms. Shelton added that the video gives examples to clarify.

Member Gomes moved for adoption of the proposed policy. With a second by Member Beltrami, the item passed unanimously.

Item 10 Legislation, Workload, and September Agendas

Paula Higashi reported the following:

- AB 1679. Possible proposed amendments include: 1) removal of the provision setting a six-month statute of limitations for the Commission to complete its work on incorrect reduction claims, and 2) addition of a provision giving the Controller's Office 90 days to review an incorrect reduction claim.
- AB 1110. The local claims bill is set for hearing Monday in the Senate Appropriations Committee.
- SB 1033 Application. Butte County approved filing of reapplication and passed their resolution. The application should be in next week. The members were given a revised tentative schedule.
- Workload. The E.D. Report includes the Incorrect Reduction Claims workload data on file in the Commission office at the time agenda materials were prepared. Staff met with claimants' representatives regarding the projected numbers of claims they anticipate filing within the next year. Staff subsequently met with representatives of the State Controller's Office (SCO).

  At these meetings, staff discussed their plan to address the current incorrect reduction claim (IRC) workload and the assistance it needs from claimants. Claimants agreed to 1) identify Open Meetings claims with issues similar to the San Diego claim and, 2) identify a representative sample of claims to act as leads for cities, counties, small school districts, and special districts. The Commission will determine remaining issues and send the representative claims to the SCO. The remaining claims will also be sent to the SCO for comment, though the SCO may be allowed to delay comments on those claims until the lead claims are resolved.

Claimants have agreed to meet in informal conferences with the SCO, though the SCO is still considering that option.

The Open Meetings lead claims will be sent to the SCO to start the comment period. Once the records are closed, staff will come back to the Commission with recommendations.

Ms. Higashi reported an informal conference with Jim Cunningham, the lead claimant on the Graduation Requirements IRC regarding the administrative record. Staff may convene an informal conference including the SCO to identify the issues and determine if additional briefing is warranted before a determination can be made.

- Budget Change Proposal (BCP). The Commission's BCP will be based on the workload numbers presented, expectations for new workload, and staff's experience with past workload. Following today's meeting, Ms. Higashi will meet with representatives to discuss workload, priorities, and scheduling.
- Commission Office Move. The Department of General Services has identified a space, which is still under consideration. Staff should know more within the next few weeks.

The Chair acknowledged the claimants' and representatives' frustrations and noted that the Commission is trying to develop expedited processes for all claimants.

IX. PUBLIC COMMENT

None.

X. ADJOURNMENT

Hearing no further business, Chairperson Porini adjourned the hearing at 11:58 a.m.

PAULA HIGASHI
Executive Director

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COMMISSION ON STATE MANDATES

NOTICE AND AGENDA

Public Meeting and Hearing

September 30, 1999

State Capitol, Room 437
Sacramento, California

9:00 A.M. - CLOSED EXECUTIVE SESSION (Tentative)

9:30 A.M. - PUBLIC MEETING AND HEARING

I. CALL TO ORDER AND ROLL CALL

II. CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTION 11126.

Pending Litigation

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

- *County of San Bernardino* v. *State of California, et al.*, Case Number SCV52190, in the Superior Court of the State of California, County of Los Angeles.
- *County of Sonoma* v. *Commission on State Mandates, et al.*, Case Number SV221243, in the Superior Court of California, County of Sonoma.
- *Gary D. Hori* v. *Commission on State Mandates, et al.*, Case Number 99AS01517, in the Superior Court of the State of California, County of Sacramento.
- *Goff* v. *Commission on State Mandates, County of Sacramento et al.*, remanded to Superior Court by the Court of Appeal, Third District, Case Number 95CS01215. (Re: County of Sacramento's First SB 1033 Application.)

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

- Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

III. REPORT FROM CLOSED EXECUTIVE SESSION - 9:30 a.m.

IV. PROPOSED CONSENT CALENDAR

Note: If there are no objections to any of the following action items, the Executive Director will include it on the Proposed Consent Calendar that will be presented at the hearing. The Commission will determine which items will remain on the Consent Calendar.

V. APPROVAL OF MINUTES (action)

Item 1 August 26, 1999

Item 2 September 15, 1999

VI. HEARINGS AND DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (action)

A. TEST CLAIMS

Item 3 *Behavioral Intervention Plans* - CSM-4464
Butte County Office of Education, San Diego Unified School District, and San Joaquin County Office of Education, Co-Claimants
Education Code Section 56523
Statutes of 1990, Chapter 959
Title 5, California Code of Regulations,
Sections 3001 and 3052

B. INCORRECT REDUCTION CLAIM

Item 4 Request for Disqualification of the Commission Member Representing the State Controller pursuant to California Code of Regulations, Title 2, Section 1187.3, Subdivision (b), on Item 5, Open Meetings Act - CSM-96-4257-I-b, CSM-98-4257-I-54, Request of the San Diego Unified School District, Claimant, dated August 27, 1999.

Item 5 *Open Meetings Act* - CSM-96-4257-I-b; CSM-98-4257-I-54
San Diego Unified School District, Claimant
Statutes of 1986, Chapter 641

C. ADOPTION OF PROPOSED STATEMENT OF DECISION

Item 6 *Peace Officers Procedural Bill of Rights* – CSM-4499
City of Sacramento, Claimant
Statutes of 1976, Chapter 465
Statutes of 1978, Chapters 775, 1173, 1174, and 1178
Statutes of 1979, Chapter 405
Statutes of 1980, Chapter 1367
Statutes of 1982, Chapter 944
Statutes of 1983, Chapter 964
Statutes of 1989, Chapter 1165
Statutes of 1990, Chapter 675

D. REQUEST FOR RECONSIDERATION OF PRIOR FINAL DECISION PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1188.4.

Item 7 Long Beach Unified School District's June 24, 1996, Request to Hear and Decide Education Code Section 56026 - *Maximum Age Limit: Special Education for Ages 3 to 5, and 18 to 21*
Statutes of 1977, Chapter 1247
Statutes of 1980, Chapter 797, et al.
As Part of the Special Education Test Claim Filed by
Riverside County Superintendent of Schools and
Supplemental Claimants (Request to Reconsider the Statement of Decision dated November 30, 1998)

VII. INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

A. ADOPTION OF PROPOSED PARAMETERS AND GUIDELINES

Item 8 *Criminal Background Checks, (a.k.a. Michelle Montoya School Safety Act)*
CSM-97-TC-16
Lake Tahoe Unified School District and Irvine Unified School District, Co-Claimants
Education Code Sections 44237, 45125, 45125.1, 44332.6, 44830.1, and 45122.1
Statutes of 1997, Chapters 588 and 589

Item 9 *Pupil Residency Verification and Appeals* – CSM-96-348-01
Sweetwater Union High School District and
South Bay Union School District, Co-Claimants
Education Code Sections 14502, 48204.5, and 48204.6
Revenue and Taxation Code Section 97.3
Specified Executive Orders, Standards, and Procedures
Statutes of 1984, Chapter 268
Statutes of 1995, Chapter 309

B. REQUESTS TO AMEND PARAMETERS AND GUIDELINES

Item 10 *Mandate Reimbursement Process – Amendment*
CSM-4485-PGA-98-01
Statutes of 1975, Chapter 486
Statutes of 1984, Chapter 1459
Statutes of 1995, Chapter 303 (Budget Act of 1995)
Statutes of 1996, Chapter 162 (Budget Act of 1996)
Statutes of 1997, Chapter 282 (Budget Act of 1997)
Statutes of 1998, Chapter 324 (Budget Act of 1998)
Statutes of 1999, Chapter 50 (Budget Act of 1999)

Item 11 *Juvenile Court Notices II* – CSM-98-4475-PGA-1
Sweetwater Union High School District, Claimant
Statutes of 1995, Chapter 71

C. ADOPTION OF PROPOSED REGULATORY ACTION

Item 12 Proposed Amendments to California Code of Regulations, Title 2 Chapter 2.5, Section 1182.and Section 1187.2 Quorum and Voting Requirements (Tie Vote).

VIII. EXECUTIVE DIRECTOR'S REPORT

Item 13 Legislation, Workload, and October Agendas

IX. PUBLIC COMMENT

<RECESS>

1:00 P. M. (TENTATIVE)

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

PROPOSED PARAMETERS AND GUIDELINES

Item 14 *Special Education* – CSM-3986
Riverside County Superintendent of Schools, Claimant and
North Region SELPA (Alameda Unified School District, Administrative Unit), Castro Valley Unified School District, Contra Costa SELPA, Grant Union High School District, Newport Mesa Unified School District, Oakland Unified School District, Palo Alto Unified School District, and San Mateo-Foster City School District, Supplemental Claimants

Education Code Sections 56026, subdivision (c)(4), 56171, subdivision (a), 56190, 56191, 56192, 56194, 56321, 56325, subdivision (b), 56346, 56362,
subdivisions (c), (d), (e), and (f), and 56363.3

Statutes of 1980, Chapters 797, 1329, and 1353; Statutes of 1981, Chapters 972, 1044, and 1094; Statutes of 1982, Chapter 1201; Statutes of 1987, Chapters 311 and 1452; Statutes of 1988, Chapter 35; Statutes of 1991, Chapter 223; Statutes of 1992, Chapter 1361; Statutes of 1993, Chapter 1296; Statutes of 1994, Chapter 1288; and Statutes of 1995, Chapter 530

Title 5, California Code of Regulations, Sections 3043 and 3067, subdivision (d)

ADJOURNMENT

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COMMISSION ON STATE MANDATES

Public Meeting and Hearing

September 30, 1999

ITEMS CONTINUED

ADOPTION OF PROPOSED STATEMENT OF DECISION (Request of Claimant)

Item 6 *Peace Officers Procedural Bill of Rights* - CSM-4499
City of Sacramento, Claimant
Statutes of 1976, Chapter 465
Statutes of 1978, Chapters 775, 1173, 1174, and 1178
Statutes of 1979, Chapter 405
Statutes of 1980, Chapter 1367
Statutes of 1982, Chapter 944
Statutes of 1983, Chapter 964
Statutes of 1989, Chapter 1165
Statutes of 1990, Chapter 675

ADOPTION OF PROPOSED PARAMETERS AND GUIDELINES (Continued by Staff)

Item 8 *Criminal Background Checks, (a.k.a. Michelle Montoya School Safety Act)*
CSM-97-TC-16
Lake Tahoe Unified School District and Irvine Unified School District, Co-Claimants
Education Code Sections 44237, 45125, 45125.1, 44332.6, 44830.1, and 45122.1; Statutes of 1997, Chapters 588 and 589

PROPOSED CONSENT CALENDAR

ADOPTION OF PROPOSED PARAMETERS AND GUIDELINES

Item 9 *Pupil Residency Verification and Appeals* - CSM-96-348-01
Sweetwater Union High School District and
South Bay Union School District, Co-Claimants
Education Code Sections 14502, 48204.5, and 48204.6
Revenue and Taxation Code Section 97.3
Specified Executive Orders, Standards, and Procedures
Statutes of 1984, Chapter 268; Statutes of 1995, Chapter 309

REQUESTS TO AMEND PARAMETERS AND GUIDELINES

Item 10 *Mandate Reimbursement Process - Amendment*
CSM-4485-PGA-98-01
Statutes of 1975, Chapter 486; Statutes of 1984, Chapter 1459
Statutes of 1995, Chapter 303 (Budget Act of 1995); Statutes of 1996, Chapter 162 (Budget Act of 1996); Statutes of 1997, Chapter 282 (Budget Act of 1997); Statutes of 1998, Chapter 324 (Budget Act of 1998); Statutes of 1999, Chapter 50 (Budget Act of 1999)

Item 11 *Juvenile Court Notices II* – CSM-98-4475-PGA-1
Sweetwater Union High School District, Claimant
Statutes of 1995, Chapter 71

Correction: On Bates page 11, in the first complete sentence, the fiscal year should read 1997-98, instead of 1998-99. The Commission's regulations provide for an amendment to apply to the previous fiscal year's reimbursement. This request to amend the Ps and Gs was filed on July 20, 1998. Therefore, if adopted it would apply to the previous fiscal year, which is 1997-98. .

Hearing Date: September 30, 1999
File Number: CSM 4499
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Item # 6

Proposed Statement of Decision

Government Code Sections 3300 through 3310

As Added and Amended by Statutes of 1976, Chapter 465;
Statutes of 1978, Chapters 775, 1173, 1174, and 1178;
Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994;
Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and
Statutes of 1990, Chapter 675

Peace Officers Procedural Bill of Rights

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Hearing Date: September 30, 1999
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Item # 6

Proposed Statement of Decision

Government Code Sections 3300 through 3310

As Added and Amended by Statutes of 1976, Chapter 465;
Statutes of 1978, Chapters 775, 1173, 1174, and 1178;
Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994;
Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and
Statutes of 1990, Chapter 675

Peace Officers Procedural Bill of Rights

Executive Summary

Introduction

On August 26, 1999 the Commission approved this test claim with a 5 to 1 vote.

The test claim legislation provides procedural protections to peace officers employed by local agencies and school districts when a peace officer is subject to an interrogation by the employer, is facing punitive action or receives an adverse comment in his or her personnel file. The protections required by the test claim legislation apply to peace officers classified as permanent employees, peace officers who serve at the pleasure of the agency, and peace officers on probation who have not reached permanent status.

The Commission adopted the Staff Analysis on the test claim with one change relating to Government Code section 3303, subdivision (g).[1] That section states in pertinent part the following:

> "The complete interrogation of a public safety officer *may* be recorded. *If* a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. . . . The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation." (Emphasis added.)

Based on the evidence presented at the hearing, the Commission recognized the reality faced by labor relations' professionals in their implementation of the test claim legislation. Accordingly, the Commission found that tape recording the interrogation when the employee records the interrogation is a mandatory activity to ensure that all parties have an accurate record. The Commission's finding is also consistent with the legislative intent to assure stable employer-employee relations are continued throughout the state and that effective services are provided to the people.

[1] The Staff Analysis on the test claim is attached as Exhibit B. The uncorrected August 26, 1999 Hearing Transcript is attached as Exhibit A.

The Commission did not discuss at the hearing the second part of the statute, which requires the employer to provide the employee with access to the tape under specified circumstances when a recording of the interrogation is made. However, the staff analysis adopted by the Commission stated the following in this regard:

> "One of the conditions imposed by the test claim statute requires employers to provide the tape recording to interrogated peace officers if further proceedings are contemplated. If the further proceeding is disciplinary action, then under certain circumstances, due process requires the employer to provide an employee who holds either a property or liberty interest in the job with the materials upon which the disciplinary action is based.
>
> Accordingly, even in the absence of the test claim legislation, the due process clause requires employers to provide such materials, including the tape recording of the interrogation when:
>
> - A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
> - A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal, and when
> - The disciplinary action is based, in whole or in part, on the interrogation of the employee.
>
> Under these circumstances, the requirement to produce the tape recording of the interrogation under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause."[2]

The above analysis, which finds that providing the employee with access to the tape if further proceedings are contemplated does not constitute a new program or higher level of service when the further proceeding is a disciplinary action protected by the due process clause, is incorporated into the attached Proposed Statement of Decision and is consistent with the Commission's decision.

Accordingly, with regard to tape recording the interrogation, the Proposed Statement of Decision includes the following reimbursable state mandated activities:

- Tape recording the interrogation when the employee records the interrogation. (Gov. Code, § 3303, subd. (g).)
- Providing the employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories (Gov. Code, § 3303, subd. (g)):
  - (a) The further proceeding is not a disciplinary action;
  - (b) The further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty

[2] Exhibit __, page A-19 and 20 of the Staff Analysis.

interest *is not* affected (i.e., the charges supporting the dismissal does not harm the employee's reputation or ability to find future employment);

(c) The further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;

(d) The further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;

(e) The further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee. (See also activity numbers 4 and 5 below, and in the Conclusion of the SOD at page 31.)

Conclusion and Staff Recommendation

Based on a comparison of the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation, the Commission concluded that the test claim legislation constitutes a partial reimbursable state mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following reimbursable activities:

1. Providing the opportunity for an administrative appeal for the following disciplinary actions (Gov. Code, § 3304, subd. (b)):
   - Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest are *not* affected (i.e., the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
   - Transfer of permanent, probationary and at-will employees for purposes of punishment;
   - Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
   - Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.
2. Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
3. Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)
4. Tape recording the interrogation when the employee records the interrogation. (Gov. Code, § 3303, subd. (g).)
5. Providing the employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories (Gov. Code, § 3303, subd. (g)):

   (a) The further proceeding is not a disciplinary action;

(b) The further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e., the charges supporting the dismissal does not harm the employee's reputation or ability to find future employment);

(c) The further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;

(d) The further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;

(e) The further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.

6. Producing transcribed copies of any notes made by a stenographer at an interrogation, and reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer in the following circumstances (Gov. Code, § 3303, subd. (g)):

(a) When the investigation *does not* result in disciplinary action; and

(b) When the investigation results in:

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
- A transfer of a permanent, probationary or at-will employee for purposes of punishment;
- A denial of promotion for a permanent, probationary or at-will employee for reasons other than merit; or
- Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career of the employee.

6. Performing the following activities upon receipt of an adverse comment (Gov. Code, §§ 3305 and 3306):

<u>School Districts</u>

(a) If the adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then schools are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If the adverse comment *is* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If the adverse comment *is not* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Counties

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then counties are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If the adverse comment *is* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If the adverse comment *is not* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Cities and Special Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then cities and special districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If the adverse comment *is* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If the adverse comment *is not* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Staff Recommendation

Staff recommends that the Commission approve the Proposed Statement of Decision (beginning on page 7), which accurately reflects the Commission's decision in this case.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM: Government Code Sections 3300 through 3310, As Added and Amended by Statutes of 1976, Chapter 465; Statutes of 1978, Chapters 775, 1173, 1174, and 1178; Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675; and Filed on December 21, 1995; By the City of Sacramento, Claimant.	NO. CSM 4499 *Peace Officers Procedural Bill of Rights* PROPOSED STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (Presented on September 30, 1999)

PROPOSED STATEMENT OF DECISION

On August 26, 1999 the Commission on State Mandates (Commission) heard this test claim during a regularly scheduled hearing. Ms. Pamela A. Stone appeared for the City of Sacramento. Mr. Allan Burdick appeared for the League of California Cities/SB 90 Service. Ms. Elizabeth Stein appeared for the California State Personnel Board. Mr. James Apps and Mr. Joseph Shinstock appeared for the Department of Finance. The following persons were witnesses for the City of Sacramento: Ms. Dee Contreras, Director of Labor Relations, and Mr. Edward J. Takach, Labor Relations Officer.

At the hearing, oral and documentary evidence was introduced, the test claim was submitted, and the vote was taken.

The law applicable to the Commission's determination of a reimbursable state mandated program is Government Code section 17500 et seq. and section 6, article XIII B of the California Constitution and related case law.

The Commission, by a vote of 5 to 1, approved this test claim.

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BACKGROUND

In 1976, the Legislature enacted Government Code sections 3300 through 3310, known as the Peace Officers Procedural Bill of Rights Act. The test claim legislation provides a series of rights and procedural safeguards to peace officers employed by local agencies and school districts that are subject to investigation or discipline. Legislative intent is expressly provided in Government Code section 3301 as follows:

> "The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, within the State of California."

The test claim legislation applies to all employees classified as "peace officers" under specified provisions of the Penal Code, including those peace officers employed by counties, cities, special districts and school districts.[3] The test claim legislation also applies to peace officers that are classified as permanent employees, peace officers who serve at the pleasure of the agency and are terminable without cause ("at-will" employees)[4] and peace officers on probation who have not reached permanent status.[5]

COMMISSION FINDINGS

Issue: Does the test claim legislation, which establishes rights and procedures for peace officers subject to investigation or discipline, constitute a reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514[6]?

For a statute to impose a reimbursable state mandated program, the statutory language must direct or obligate an activity or task upon local governmental agencies. In addition, the required activity or task must be new, thus constituting a "new program", or create an increased or "higher level of service" over the former required level of service. The court has

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[3] Government Code section 3301 states: "For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code."

[4] *Gray* v. *City of Gustine* (1990) 224 Cal.App.3d 621; *Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795.

[5] *Bell* v. *Duffy* (1980) 111 Cal.App.3d 643; *Barnes* v. *Personnel Department of the City of El Cajon* (1978) 87 Cal.App.3d 502.

[6] Government Code section 17514 defines "costs mandated by the state" as follows: "'Costs mandated by the state' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

defined a "new program" or "higher level of service" as a program that carries out the governmental function of providing services to the public, or a law which, to implement a state policy, imposes unique requirements on local agencies and does not apply generally to all residents and entities in the state. To determine if a required activity is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately prior to the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must be state mandated and impose "costs mandated by the state."[7]

The test claim legislation requires local agencies and school districts to take specified procedural steps when investigating or disciplining a peace officer employee. The stated purpose of the test claim legislation is to promote stable relations between peace officers and their employers and to ensure the effectiveness of law enforcement services. Based on the legislative intent, the Commission found that the test claim legislation carries out the governmental function of providing a service to the public. Moreover, the test claim legislation imposes unique requirements on local agencies and school districts that do not apply generally to all residents and entities of the state. Thus, the Commission determined that the test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.

The Commission recognized, however, that several California courts have analyzed the test claim legislation and found a connection between its requirements and the requirements imposed by the due process clause of the United States and California Constitutions. For example, the court in *Riveros* v. *City of Los Angeles* analyzed the right to an administrative appeal under the test claim legislation for a probationary employee and noted that the right to such a hearing arises from the due process clause.

> "*The right to such a hearing arises from the due process protections of the Fourteenth Amendment to the United States Constitution.* . . . .The limited purpose of the section 3304 appeal is to give the peace officer a chance to establish a formal record of the circumstances surrounding his termination and try to convince his employer to reverse its decision, either by showing that the charges are false or through proof of mitigating circumstances [citation omitted]. *This is very nearly the same purpose for the hearing mandated by due process requirements*, which must afford the officer a chance to refute the charges or clear his name." (Emphasis added.)[8]

Thus, the Commission continued its inquiry and compared the test claim legislation to the prior legal requirements imposed on public employers by the due process clause to determine if the activities defined in the test claim legislation are new or impose a higher level of service.

The Commission also considered whether there are any "costs mandated by the state." Since the due process clause of the United States Constitution is a form of federal law, the Commission recognized that Government Code section 17556, subdivision (c), is triggered.

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[7] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *City of Sacramento* v. *State of California* (1990) 50 Cal.3d 51, 66; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835; Gov. Code, § 17514.

[8] *Riveros* v. *City of Los Angeles* (1996) 41 Cal.App.4th 1342, 1359.

Pursuant to Government Code section 17556, subdivision (c), there are *no* "costs mandated by the state" and no reimbursement is required if the test claim legislation "implemented a federal law resulting in costs mandated by the federal government, unless the [test claim legislation] mandates costs which exceed the mandate in that federal law or regulation."[9]

These issues are discussed below.

The Due Process Clause of the U.S. and California Constitutions

The due process clause of the United States and California Constitutions provide that the state shall not "deprive any person of life, liberty, or property without due process of law."[10] In the public employment arena, an employee's property and liberty interests are commonly at stake.

Property Interest in Employment

Property interests protected by the due process clause extend beyond actual ownership of real estate or money. The U.S. Supreme Court determined that a property interest deserving protection of the due process clause exists when an employee has a "legitimate claim" to continued employment.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . ."
>
> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - -rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[11]

Applying the above principles, both the U.S. Supreme Court and California courts hold that "permanent" employees, who can only be dismissed or subjected to other disciplinary measures for "cause", have a legitimate claim of entitlement to their job and thus, possess a property interest in continued employment.[12]

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[9] Government Code section 17513 defines "costs mandated by the federal government" as follows:

> " 'Costs mandated by the federal government' means any increased costs incurred by a local agency or school district after January 1, 1973, in order to comply with the requirements of a federal statute or regulation. 'Costs mandated by the federal government' includes costs resulting from enactment of state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state. 'Costs mandated by the federal government' does not include costs which are specifically reimbursed or funded by the federal or state government or programs or services which may be implemented at the option of the state, local agency, or school district."

[10] U.S. Constitution, 14th Amendment; California Constitution, Article 1, §§ 7 and 15.

[11] *Board of Regents* v. *Roth* (1972) 408 U.S. 564, 577.

[12] *Slochower* v. *Board of Education* (1956) 350 U.S. 551, where the U.S. Supreme Court found that a tenured college professor dismissed from employment had a property interest in continued employment that was safeguarded by the due process clause; *Gilbert* v. *Homar* (1997) 520 U.S. 924, where the U.S. Supreme Court found that a police officer, employed as a permanent employee by a state university, had a property interest in continued employment and was afforded due process protections resulting from a suspension without pay; *Skelly* v. *State*

Moreover, California courts require employers to comply with due process when a permanent employee is dismissed[13], demoted[14], suspended[15], receives a reduction in salary[16] or receives a written reprimand.[17]

The Department of Finance and the State Personnel Board contended that due process property rights attach when an employee is transferred. They cited *Runyon* v. *Ellis* and an SPB Decision (*Ramallo* SPB Dec. No. 95-19) for support.

The Commission disagreed with the State's argument in this regard. First, in *Runyon* v. *Ellis*, the court found that the employee was entitled to an administrative hearing under the due process clause as a result of a transfer *and an accompanying reduction of pay*. The court did not address the situation where the employee receives a transfer alone.[18] In addition, in *Howell* v. *County of San Bernardino*, the court recognized that "[a]lthough a permanent employee's right to continued employment is generally regarded as fundamental and vested, an employee enjoys no such right to continuation in a particular job assignment."[19] Thus, the Commission found that local government employers are not required to provide due process protection in the case of a transfer.

Furthermore, although the SPB decision may apply to the State as an employer, the Commission found that that the SPB decision does not apply to actions taken by a local government employer.

Accordingly, the Commission found that an employee does *not* enjoy the rights prescribed by the due process clause when the employee is transferred.

When a property interest is affected and due process applies, the procedural safeguards required by the due process clause generally require notice to the employee and an opportunity to respond, with some variation as to the nature and timing of the procedural safeguards. In cases of dismissal, demotion, long-term suspension and reduction of pay, the California Supreme Court in *Skelly* prescribed the following due process requirements *before* the discipline becomes effective:

- Notice of the proposed action;
- The reasons for the action;
- A copy of the charges and materials upon which the action is based; and

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Personnel Board (1975) 15 Cal.3d 194, where the California Supreme Court held a permanent civil service employee of the state has a property interest in continued employment and cannot be dismissed without due process of law.

[13] *Skelly, supra*, 15 Cal.3d 194.

[14] *Ng.* v. *State Personnel Board* (1977) 68 Cal.App.3d 600.

[15] *Civil Service Assn.* v. *City and County of San Francisco* (1978) 22 Cal.3d 552, 558-560.

[16] *Ng, supra*, 68 Cal.App.3d 600, 605.

[17] *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438.

[18] *Runyon* v. *Ellis* (1995) 40 Cal.App.4th 961.

[19] *Howell* v. *County of San Bernardino* (1983) 149 Cal.App.3d 200, 205.

- The right to respond, either orally or in writing, to the authority initially imposing discipline.[20]

In cases of short-term suspensions (ten days or less), the employee's property interest is protected as long as the employee receives notice, reasons for the action, a copy of the charges, and the right to respond *either during the suspension, or within a reasonable time thereafter*.[21]

Similarly, the Commission found that in the case of a written reprimand where the employee is not deprived of pay or benefits, the employer is not required to provide the employee with the due process safeguards *before* the effective date of the written reprimand. Instead, the court in *Stanton* found that an appeals process provided to the employee *after* the issuance of the written reprimand satisfies the due process clause.[22]

The claimant disagreed with the Commission's interpretation of the *Stanton* case and its application to written reprimands.

The claimant contended *Stanton* stands for the proposition that the due process guarantees outlined in *Skelly* do not apply to a written reprimand. Thus, the claimant concluded that an employee is not entitled to any due process protection when the employee receives a written reprimand. The claimant cited the following language from *Stanton* in support of its position:

> ". . . As the City notes, no authority supports plaintiff's underlying assertion that issuance of a written reprimand triggers the due process safeguards outlined in *Skelly*. Courts have required adherence to *Skelly* in cases in which an employee is demoted [citations omitted]; suspended without pay [citations omitted]; or dismissed [citations omitted]. We find no authority mandating adherence to *Skelly* when a written reprimand is issued."
>
> "We see no justification for extending *Skelly* to situations involving written reprimands. Demotions, suspension and dismissal all involve depriving the public employee of pay or benefits; a written reprimand results in no such loss to the employee."

The facts in *Stanton* are as follows. A police officer received a written reprimand for discharging a weapon in violation of departmental rules. After he received the reprimand, he appealed to the police chief in accordance with the memorandum of understanding and the police chief upheld the reprimand. The officer then filed a lawsuit contending that he was entitled to an administrative appeal. The court denied the plaintiff's request finding that that the meeting with the police chief satisfied the administrative appeals provision in the test claim legislation (Government Code section 3304), and thus, satisfied the employee's due process rights.

The Commission agreed that the court in *Stanton* held the rights outlined in *Skelly* do not apply when an employee receives a written reprimand. Thus, under *Skelly*, the rights to receive notice, the reasons for the reprimand, a copy of the charges and the right to respond are not required to be given to an employee *before* the reprimand takes effect.

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[20] *Skelly, supra*, 15 Cal.3d 194, 215.

[21] *Civil Service Assn., supra*, 22 Cal.3d 552, 564.

[22] *Stanton, supra*, 226 Cal.App.3d 1438, 1442.

However, the court found that the employee *is* guaranteed due process protection upon receipt of a written reprimand. The court found that when the appeals process takes places *after* the reprimand, due process is satisfied. The court in *Stanton* also states the following:

> "Moreover, Government Code section 3303 et seq., the Public Safety Officer Procedural Bill of Rights Act, provides police officers who are disciplined by their departments with procedural safeguards. Section 3304, subdivision (b) states no punitive action may be taken by a public agency against a public safety officer without providing the officer with an opportunity for administrative appeal. Punitive action includes written reprimands. [Citation omitted.] Even without the protection afforded by Skelly, plaintiff's *procedural due process rights*, following a written reprimand, ***are protected*** by the appeals process mandated by Government Code section 3304, subdivision (b)." (Emphasis added.)[23]

Accordingly, the Commission found that the due process clause of the United States and California Constitutions apply when a permanent employee is

- Dismissed;
- Demoted;
- Suspended;
- Receives a reduction in salary; and
- Receives a written reprimand.

Liberty Interest

Although probationary and at-will employees, who can be dismissed without cause, do not have a property interest in their employment, the employee may have a liberty interest affected by a dismissal when the charges supporting the dismissal damage the employee's reputation and impair the employee's ability to find other employment. The courts have defined the liberty interest as follows:

> "[A]n employee's liberty is impaired if the government, in connection with an employee's dismissal or failure to be rehired, makes a 'charge against him that might seriously damage his standing and associations in the community,' such as a charge of dishonesty or immorality, or would 'impose on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.' [Citations omitted.] A person's protected liberty interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. [Citations omitted.] Rather, the liberty interest is infringed only when the defamation is made in

[23] *Stanton, supra*, 226 Cal.App.3d 1438, 1442.

connection with the loss of a government benefit, such as,...employment. [Citations omitted.]" [24]

For example, in *Murden* v. *County of Sacramento*, the court found a protected liberty interest when a *temporary* deputy sheriff was dismissed from employment based on charges that he was engaging two female employees in embarrassing and inappropriate conversation regarding sexual activities. The court noted that the charge impugned the employee's character and morality, and if circulated, would damage his reputation and impair his ability to find other employment.

The court in *Murden* clarified that a dismissal based on charges that the employee was unable to learn the basic duties of the job does *not* constitute a protected interest.[25]

When the employer infringes on a person's liberty interest, due process simply requires notice to the employee, and an opportunity to refute the charges and clear his or her name. Moreover, the "name-clearing" hearing can take place *after* the actual dismissal.[26]

Accordingly, the Commission found that the due process clauses of the United States and California Constitutions apply when the charges supporting the dismissal of a probationary or at-will employee damage the employee's reputation and impair the employee's ability to find other employment.

Test Claim Legislation

As indicated above, employers are required by the due process clause to offer notice and hearing protections to *permanent* employees for dismissals, demotions, suspensions, reductions in salary and written reprimands.

Employers are also required by the due process clause to offer notice and hearing protections to *probationary* and *at-will* employees when the dismissal harms the employee's reputation and ability to obtain future employment.

As more fully discussed below, the Commission found that the test claim legislation imposes some of the *same* notice and hearing requirements imposed under the due process clause.

Administrative Appeal

Government Code section 3304, as added by the test claim legislation, provides that "no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."[27]

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[24] *Murden* v. *County of Sacramento* (1984) 160 Cal.App.3d 302, 308, quoting from *Board of Regents* v. *Roth*, *supra*, 408 U.S. at p. 573. See also *Paul* v. *Davis* (1976) 424 U.S. 693, 711-712; and *Lubey* v. *City and County of San Francisco* (1979) 98 Cal.App.3d 340.

[25] *Murden*, *supra*. 160 Cal.App.3d 302, 308.

[26] *Murden*, *supra*, 160 Cal.App.3d 302, 310; *Arnett* v. *Kennedy* (1974) 416 U.S. 134, 157; and *Codd* v. *Velger* (1977) 429 U.S. 624, 627.

[27] In the Claimant's comments to the Draft Staff Analysis, the claimant recited Government Code section 3304, *as amended in 1997 (Stats. 1997, c. 148) and 1998 (Stats. 1998, c. 786)*. These amendments made substantive changes to Government Code section 3304 by adding subdivisions (c) through (g). These changes include a statute of limitations concerning how long the agency can use acts as a basis for discipline, a provision prohibiting the removal

Punitive action is defined in Government Code section 3303 as follows:

> "For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary[28], written reprimand, or transfer for purposes of punishment."

The California Supreme Court determined that the phrase "for purposes of punishment" in the foregoing section relates only to a transfer and not to other personnel actions.[29] Thus, in transfer cases, the peace officer is required to prove that the transfer was intended for purposes of punishment in order to be entitled to an administrative appeal. If the transfer is to "compensate for a deficiency in performance," however, an appeal is not required.[30, 31]

In addition, at least one California appellate court determined that employers must extend the right to an administrative appeal under the test claim legislation to peace officers for other actions taken by the employer that result in "disadvantage, harm, loss or hardship" and impact the peace officer's career.[32] In *Hopson*, the court found that an officer who received a report in his personnel file by the police chief regarding a shooting in violation of policies and procedures was entitled to an administrative appeal under Government Code section 3304. The court held that the report constituted "punitive action" under the test claim legislation based on the source of the report, its contents, and its potential impact on the career of the officer.[33]

The Commission recognized that the test claim legislation does not specifically set forth the hearing procedures required for the administrative appeal. Rather, the type of administrative appeal is left up to the discretion of each local agency and school district.[34] The courts have determined, however, that the type of hearing required under Government Code section 3304 must comport with standards of fair play and due process.[35, 36]

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of a chief of police without providing written notice describing the reasons for the removal and an administrative hearing, and a provision limiting the right to an administrative appeal to officers who successfully complete the probationary period. The Commission noted that ***neither the 1997 nor 1998 statutes are alleged in this test claim.***

[28] The courts have held that "reduction in salary" includes loss of skill pay (*McManigal* v. *City of Seal Beach* (1985) 166 Cal.App.3d 975, pay grade (*Baggett* v. *Gates* (1982) 32 Cal.3d 128, rank (*White* v. *County of Sacramento* (1982) 31 Cal.3d 676, and probationary rank (*Henneberque* v. *City of Culver City* (1983) 147 Cal.App.3d 250.

[29] *White* v. *County of Sacramento* (1982) 31 Cal.3d 676.

[30] *Holcomb* v. *City of Los Angeles* (1989) 210 Cal.App.3d 1560; *Heyenga* v. *City of San Diego* (1979) 94 Cal.App.3d 756; *Orange County Employees Assn., Inc.* v. *County of Orange* (1988) 205 Cal.App.3d 1289.

[31] The claimant testified that what constitutes a transfer for purposes of punishment is in the eyes of the employee. The claimant stated that in the field if labor relations, peace officers will often request a full POBOR hearing and procedure on a transfer which is not acceptable to the officer in question, even though the transfer is not accompanied by a reduction in pay or benefits and no disciplinary action has been taken.

[32] *Hopson* v. *City of Los Angeles* (1983) 139 Cal.App.3d 347, 354, relying on *White* v. *County of Sacramento* (1982) 31 Cal.3d 676, 683.

[33] *Id* at p. 353-354.

[34] *Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795, 1806; *Runyan, supra,* 40 Cal.App.4th 961, 965.

[35] *Doyle* v. *City of Chino* (1981) 117 Cal.App.3d 673, 684. In addition, the court in *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1442, held that the employee's due process rights were protected by the administrative appeals process mandated by Government Code section 3304. Furthermore, in cases involving "misconduct", the officer is entitled to a liberty interest name-clearing hearing under Government section 3304. *Lubey* v. *City and County of San Francisco* (1979) 98 Cal.App.3d 340; *Murden, supra).*

The Department of Finance and the State Personnel Board contended that Government Code section 3304 does not require an administrative appeal for probationary and at-will employees. They cited Government Code section 3304, subdivision (b), as it is *currently* drafted, which provides the following: "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer *who has successfully completed the probationary period that may be required by his or her employing agency* without providing the public safety officer with an opportunity for administrative appeal."

However, the Commission determined that the italicized language in section 3304, subdivision (b), was added by the Legislature in 1998 and became effective on January 1, 1999. (Stats. 1998, c. 768). When Government Code section 3304, subdivision (b), was originally enacted in 1976, it did not limit the right to an administrative appeal to permanent employees only. Rather, that section stated the following:

> "(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

Accordingly, the Commission found that an administrative appeal under Government Code section 3304, subdivision (b), was required to be provided to probationary and at-will employees faced with punitive action or a denial of promotion until December 31, 1998.

The Department of Finance also contended that the cost of conducting an administrative hearing is already required under the due process clause and the *Skelly* case, which predate the test claim legislation.

The Commission agreed that in some circumstances, the due process clause requires the same administrative hearing as the test claim legislation. However, as reflected by the table below, the Commission found that test claim legislation is broader than the due process clause and applies to additional employer actions that have not previously enjoyed the protections of the due process clause.

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[36] The Commission noted that at least two cases have referred to the need for an administrative appeals procedure that would enable the officer to obtain court review pursuant to Code of Civil Procedure section 1094.5. Such a review implies that an evidentiary hearing be held from which a record and findings may be prepared for review by the court. (*Doyle, supra*, 117 Cal.App. 3d 673; *Henneberque, supra*, 147 Cal.App.3d 250.) In addition, the California Supreme Court uses the words "administrative appeal" of section 3304 interchangeably with the word "hearing." (*White, supra*, 31 Cal.3d 676.)

Due Process	Test Claim Legislation
Dismissal of a permanent employee	Dismissal of permanent, *probationary* or *at-will employees*
Demotion of a permanent employee	Demotion of permanent, *probationary* or *at-will employees*
Suspension of a permanent employee	Suspension of permanent, *probationary* or *at-will employees*
Reduction in salary for a permanent employee	Reduction in salary for permanent, *probationary* or *at-will employees*
Written reprimand of a permanent employee	Written reprimand of permanent, *probationary* or *at-will employees*
Dismissal of a probationary or at-will employee which harms the employee's reputation and ability to find future employment	Dismissal of a probationary or at-will employee which harms the employee's reputation and ability to find future employment
	Transfer of a permanent, probationary or at-will employee for purposes of punishment
	Denial of promotion for permanent, probationary or at-will employees on grounds other than merit
	Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee

Thus, the Commission found that the administrative appeal would be required in the absence of the test claim legislation when:

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal.

Under these circumstances, the Commission determined that the administrative appeal *does not* constitute a new program or higher level of service because prior law requires such an appeal under the due process clause. Moreover, the Commission recognized that pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing the administrative appeal in the above circumstances would not constitute "costs mandated by the state" since the administrative appeal merely implements the requirements of the United States Constitution.

The Commission found, however, that the due process clauses of the United States and California Constitutions do not require an administrative appeal in the following circumstances:

- Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e.; the charges do not harm the employee's reputation or ability to find future employment);
- Transfer of permanent, probationary and at-will employees for purposes of punishment;
- Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
- Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

Thus, in these situations, the Commission found that the administrative appeal required by Government Code section 3304 constitutes a new program or higher level of service and imposes "costs mandated by the state" under Government Code section 17514.

Compensation and Timing of an Interrogation

Government Code section 3303 describes the procedures for the interrogation of a peace officer. The procedures and rights given to peace officers under section 3303 do *not* apply to any interrogation in the normal course of duty, counseling, instruction, or informal verbal admonition by a supervisor. In addition, the requirements do not apply to an investigation concerned solely and directly with alleged criminal activities.[37]

Government Code section 3303, subdivision (a), establishes procedures for the timing and compensation of a peace officer subject to investigation and interrogation by an employer. This section requires that the interrogation be conducted at a reasonable hour, preferably at a time when the peace officer is on duty, or during the "normal waking hours" of the peace officer, unless the seriousness of the investigation requires otherwise. If the interrogation takes place during the off-duty time of the peace officer, the peace officer "shall" be compensated for the off-duty time in accordance with regular department procedures.

The claimant contended that Government Code section 3303, subdivision (a), results in the payment of overtime to the investigated employee and, thus, imposes reimbursable state mandated activities. The claimant stated the following:

> "If a typical police department works in three shifts, such as the Police Department for this City, two-thirds of the police force work hours [that are] not consistent with the work hours of Investigators in the Internal Affairs section. Even in a smaller department without such a section, hours conflict if command staff assigned to investigate works a shift different than the employees investigated. Payment of overtime occurs to the employees investigated or those performing the required investigation, or is at least a potential risk to an employer for the time an employee is interrogated pursuant to this section."

The Commission agreed. Conducting the investigation when the peace officer is on duty, and compensating the peace officer for off-duty time in accordance with regular department procedures are new requirements not previously imposed on local agencies and school districts.

Accordingly, the Commission found that Government Code section 3303, subdivision (a), constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution and imposes "costs mandated by the state" under Government Code section 17514.

Notice Prior to Interrogation

Government Code section 3303, subdivisions (b) and (c), require the employer, prior to interrogation, to inform and provide notice of the nature of the investigation and the identity of all officers participating in the interrogation to the employee.

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[37] Gov. Code, § 3303, subd. (i).

The Commission recognized that under due process principles, an employee with a property interest is entitled to notice of the disciplinary action proposed by the employer.[38] Thus, an employee is required to receive notice when the employee receives a dismissal, suspension, demotion, reduction in salary or receipt of a written reprimand. Due process, however, *does not* require notice prior to an investigation or interrogation since the employee has not yet been charged and the employee's salary and employment position have not changed.

Accordingly, the Commission found that providing the employee with prior notice regarding the nature of the interrogation and identifying the investigating officers constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution and imposes "costs mandated by the state" under Government Code section 17514.

Tape Recording of Interrogation

Government Code section 3303, subdivision (g), provides, in relevant part the following:

> "The complete interrogation of a public safety officer *may* be recorded. *If* a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. ... . The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation." (Emphasis added.)

The claimant contended that the activity of tape recording the interrogation and providing the peace officer with the tape recording of the interrogation as specified in section 3303, subdivision (g), constitute reimbursable state mandated activities. The claimant stated the following:

> "As shown above, Government Code, section 3303 (g) allows the interrogation of a peace officer to be tape recorded. The section is silent as to whom may record the interrogation, and who may request that the session be recorded. In practice, the employee will almost always request to record the interrogation. As the employee desires to record same, the employer is faced with the requirement of also tape recording the interrogation in order to assure that the employee's tape is not edited, redacted, or changed in any manner, and to have a verbatim record of the proceedings."[39]

At the hearing, Ms. Dee Contreras, Director of Labor Relations for the City of Sacramento, testified as follows:

> "If the employee comes in and tapes, and, trust me, they all come in and tape, if they're sworn peace officers, their attorneys come in with tapes. You wind up with two tape recorders on a desk. If they tape and we do not, then they have a record that we do no have or we must rely on a tape created by the employee we are investigating. That would not be a wise choice, from the employer's perspective."

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[38] *Skelly, supra,* 15 Cal.3d 194.

[39] Claimant's comments to Draft Staff Analysis.

"If we take notes and they tape, our notes are never going to be exactly the same as the tape is going to be if it's transcribed, so we wind up with what is arguably an inferior record to the record that they have."

"So it is essentially - - it says they may tape but the practical application of that is: For everybody who comes in with a tape recorder to tape, which is virtually every peace officer, we then must tape."[40]

The Department of Finance disagreed and contended that the test claim statute does not require local agencies to tape the interrogation. The Department further contended that if the local agency decides to tape the interrogation, the cost of providing the tape to the officer is required under the due process clause.

Based on the evidence presented at the hearing, the Commission recognized the reality faced by labor relations' professionals in their implementation of the test claim legislation. Accordingly, the Commission found that tape recording the interrogation when the employee records the interrogation is a mandatory activity to ensure that all parties have an accurate record. The Commission's finding is also consistent with the legislative intent to assure stable employer-employee relations are continued throughout the state and that effective services are provided to the people.[41]

The Commission also recognized that Government Code section 3303, subdivision (g), requires that the employee shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The Commission found that providing the employee with access to the tape *prior to a further interrogation at a subsequent time* is a new activity and, thus, constitutes a new program or higher level of service.

However, the Commission found that providing the employee with access to the tape *if further proceedings are contemplated* does not constitute a new program or higher level of service when the further proceeding is a disciplinary action protected by the due process clause. Under certain circumstances, due process already requires the employer to provide an employee who holds either a property or liberty interest in the job with the materials upon which the disciplinary action is based.

Accordingly, the Commission found that even in the absence of the test claim legislation, the due process clause requires employers to provide the tape recording of the interrogation to the employee when:

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal[42]; and when

[40] August 26, 1999 Hearing Transcript, page 18, lines 7-21.

[41] This finding is consistent with one of the principles of statutory construction that "where statutes provide for performance of acts or the exercise of power or authority by public officers protecting private rights or in public interest, they are mandatory." (3 Sutherland, Statutory Construction (5th ed. 1992) § 57.14, p. 36.) See also section 1183.1 of the Commission's regulations, which provides that the parameters and guidelines adopted on a mandated program shall provide a description of the most reasonable methods of complying with the mandate.

[42] *Skelly, supra*; *Ng, supra*; *Civil Service Assn., supra*; *Stanton, supra*; *Murden, supra*.

- The disciplinary action is based, in whole or in part, on the interrogation of the employee.

Under these circumstances, the Commission found that the requirement to provide access to the tape recording of the interrogation under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause. Moreover, pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing access to the tape recording merely implements the requirements of the United States Constitution.

However, when the further proceeding does not constitute a disciplinary action protected by due process, the Commission found that providing the employee with access to the tape is a new activity and, thus, constitutes a new program or higher level of service.

In sum, the Commission found that the following activities constitute reimbursable state mandated activities:

- Tape recording the interrogation when the employee records the interrogation.
- Providing the employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories:
  - (a) The further proceeding is not a disciplinary action;
  - (b) The further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e., the charges supporting the dismissal doe not harm the employee's reputation or ability to find future employment);
  - (c) The further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;
  - (d) The further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;
  - (e) The further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.

Documents Provided to the Employee

Government Code section 3303, subdivision (g), also provides that the peace officer "shall" be entitled to a transcribed copy of any interrogation notes made by a stenographer or any reports or complaints made by investigators or other persons, except those that are deemed to be confidential.

The Department of Finance and the SPB contended that the cost of providing copies of transcripts, reports and recordings of interrogations are required under the due process clause and, thus, do not constitute a reimbursable state mandated program.

In *Pasadena Police Officers Association*, the California Supreme Court analyzed Government Code section 3303, noting that it does not specify when an officer is entitled to receive the reports and complaints. The court also recognized that section 3303 does not specifically address an officer's due process entitlement to discovery in the event the officer is *charged* with

misconduct.[43] Nevertheless, the court determined that the Legislature intended to require law enforcement agencies to disclose the reports and complaints to an officer under investigation only *after* the officer's interrogation.[44]

The Commission recognized that the court's decision in *Pasadena Police Officers Association* is consistent with due process principles. Due process requires the employer to provide an employee who holds either a property or liberty interest in the job with a copy of the charges and materials upon which the disciplinary action is based when the officer is charged with misconduct.[45]

Accordingly, even in the absence of the test claim legislation, the Commission found that the due process clause requires the employer to provide a copy of all investigative materials, including non-confidential complaints, reports and charges when, as a result of the interrogation,

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal.

Under these circumstances, the requirement to produce documents under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause. Moreover, the Commission recognized that pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing the investigative materials in the above circumstances would not constitute "costs mandated by the state" since producing such documentation merely implements the requirements of the United States constitution.

However, the Commission found that the due process clause does not require employers to produce the charging documents and reports when requested by the officer in the following circumstances:

(a) When the investigation *does not* result in disciplinary action; and

(b) When the investigation results in:

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
- A transfer of a permanent, probationary or at-will employee for purposes of punishment;
- A denial of promotion for a permanent, probationary or at-will employees for reasons other than merit; or

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[43] *Pasadena Police Officers Assn.* v. *City of Pasadena* (1990) 51 Cal.3d 564, 575 (Exhibit A, Bates page 0135).

[44] *Id.* at 579.

[45] *Skelly, supra.*

- Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

The Department of Finance and the State Personnel Board disagreed with this conclusion. They contended that "*State civil service* probationary or at-will employees are entitled to [the due process rights prescribed by] *Skelly* . . . . by the State Personnel Board" to the charging documents and reports and, thus, Government Code section 3303, subdivision (g), does not constitute a reimbursable state mandated program with respect to these employees. However, they cited no authority for this proposition.

The Department of Finance and the State Personnel Board also contended that Government Code section 3303, subdivision (g), does not constitute a reimbursable state mandated program when a permanent employee is transferred based on their assertion that a transfer is covered by the due process clause. As noted earlier, the Commission disagreed with this contention and found that a permanent employee does *not* enjoy the rights prescribed by the due process clause when the employee is transferred.

Accordingly, in the circumstances described above, the Commission found that producing the documents required by Government Code section 3303, subdivision (g), constitutes a new program or higher level of service and imposes "costs mandated by the state" under Government Code section 17514.

Representation at Interrogation

Government Code section 3303, subdivision (i), provides that the peace officer "shall" have the right to be represented during the interrogation when a formal written statement of charges has been filed or whenever the interrogation focuses on matters that are likely to result in punitive action.

The claimant contended that Government Code section 3303, subdivision (i), results in reimbursable state mandated activities since additional professional and clerical time is needed to schedule the interview when the peace officer asserts the right to representation.

The Commission disagreed with the claimant's contention. Before the enactment of the test claim legislation, peace officers had the same right to representation under Government Code sections 3500 to 3510, also known as the Meyers-Milias-Brown Act (MMBA). The MMBA governs labor management relations in California local governments, including labor relations between peace officers and employers.[46]

Government Code section 3503, which was enacted in 1961, provides that employee organizations have the right to represent their members in their employment relations with public agencies. The California Supreme Court analyzed section 3503 in *Civil Service Association* v. *City and County of San Francisco*, a case involving the suspension of eight civil service employees. The court recognized an employee's right to representation under the MMBA in disciplinary actions.

> "We have long recognized the right of a public employee to have his counsel represent him at disciplinary hearings. (*Steen* v. *Board of Civil Service Commr.*

[46] *Santa Clara County Dist. Attorney Investigators Assn.* v. *County of Santa Clara* (1975) 51 Cal.App.3d 255.

(1945) 26 Cal.2d 716, 727; [Citations omitted.]) While *Steen* may have dealt with representation by a licensed attorney, the right to representation by a labor organization in the informal process here involved seems to follow from the right to representation contained in the Meyers-Milias-Brown Act and the right to representation recognized in *Steen*."[47]

Peace officers employed by school districts have similar rights under the Educational Employment Relations Act, beginning with Government Code section 3540.[48]

Based on the foregoing, the Commission found that the right to representation at the interrogation under Government Code section 3303, subdivision (i), *does not* constitute a new program or higher level of service under article XIII B, section 6 of the California Constitution.

Adverse Comments in Personnel File

Government Code sections 3305 and 3306 provide that no peace officer "shall" have any adverse comment entered in the officer's personnel file without the peace officer having first read and signed the adverse comment.[49] If the peace officer refuses to sign the adverse comment, that fact "shall" be noted on the document and signed or initialed by the peace officer. In addition, the peace officer "shall" have 30 days to file a written response to any adverse comment entered in the personnel file. The response "shall" be attached to the adverse comment.

Thus, the Commission determined that Government Code sections 3305 and 3306 impose the following requirements on employers:

- To provide notice of the adverse comment;[50]
- To provide an opportunity to review and sign the adverse comment;
- To provide an opportunity to respond to the adverse comment within 30 days; and
- To note on the document that the peace officer refused to sign the adverse comment and to obtain the peace officer's signature or initials under such circumstances.

The claimant contended that county employees have a pre-existing statutory right to inspect and respond to adverse comments contained in the officer's personnel file pursuant to Government Code section 31011. The claimant further stated that Labor Code section 1198.5 provides city employees with a pre-existing right to review, but not respond to, adverse comments. Thus, the claimant contended that Government Code sections 3305 and 3306 constitute a new program or higher level of service under article XIII B, section 6 of the California Constitution.

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[47] *Civil Service Assn., supra*, 22 Cal.3d 552, 568.

[48] Government Code section 3543.2, which was added in 1975 (Stats. 1975, c. 961) provides that school district employees are entitled to representation relating to wages, hours of employment, and other terms and conditions of employment.

[49] The court in *Aguilar* v. *Johnson* (1988) 202 Cal.App.3d 241, 249-252, held that an adverse comment under Government Code sections 3305 and 3306 include comments from law enforcement personnel and citizen complaints.

[50] The Commission found that notice is required since the test claim legislation states that "no peace officer shall have any adverse comment entered in the officer's personnel file *without the peace officer having first read and signed the adverse comment*." Thus, the Commission found that the officer must receive notice of the comment before he or she can read or sign the document.

As described below, the Commission found that Government Code sections 3305 and 3306 constitute a *partial* reimbursable state mandated program.

Due Process

Under due process principles, an employee with a property or liberty interest is entitled to notice and an opportunity to respond, either orally or in writing, prior to the disciplinary action proposed by the employer.[51] If the adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer or harms the officer's reputation and opportunity to find future employment, then the provisions of the test claim legislation which require notice and an opportunity to review and file a written response are already guaranteed under the due process clause.[52] Under such circumstances, the Commission found that the notice, review and response requirements of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution. Moreover, the Commission recognized that pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing notice and an opportunity to respond do not impose "costs mandated by the state".

However, the Commission found that under circumstances where the adverse comment affects the officer's property or liberty interest as described above, the following requirements imposed by the test claim legislation *are not* required by the due process clause:

- Obtaining the signature of the peace officer on the adverse comment, or
- Noting the peace officer's refusal to sign the adverse comment and obtain the peace officer's signature or initials under such circumstances.

The Department of Finance and the State Personnel Board stated the following: "If the adverse comment can be considered a 'written reprimand,' however, the POBOR required 'notice' and the 'opportunity to respond' may already be required by due process. The extent of due process due an employee who suffers an official reprimand is not entirely clear."

The Commission agreed that if the adverse comment results in, or is considered a written reprimand, then notice and an opportunity to respond is already required by the due process clause and are not reimbursable state mandated activities. However, due process does not require the local agency to obtain the signature of the peace officer on the adverse comment, or note the peace officer's refusal to sign the adverse comment and obtain the peace officer's signature or initials under such circumstances. Accordingly, the Commission found that these two activities required by the test claim legislation when an adverse comment is received constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514 even where there is due process protection.

The Legislature has also established protections for local public employees similar to the protections required by Government Code sections 3305 and 3306 in statutes enacted prior to the test claim legislation. These statutes are discussed below.

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[51] *Skelly, supra,* 15 Cal.3d 194.

[52] *Hopson, supra,* 139 Cal.App.3d 347.

Existing Statutory Law Relating to Counties

Government Code section 31011, enacted in 1974,[53] established review and response protections for county employees. That section provides the following:

> "Every county employee shall have the *right to inspect and review* any official record relating to his or her performance as an employee or to a grievance concerning the employee which is kept or maintained by the county; provided, however, that the board of supervisors of any county may exempt letters of reference from the provisions of this section.
>
> The contents of such records shall be made available to the employee for inspection and review at reasonable intervals during the regular business hours of the county.
>
> The county shall provide an opportunity for the employee to *respond* in writing, or personal interview, to any information about which he or she disagrees. Such response shall become a permanent part of the employee's personnel record. The employee shall be responsible for providing the written responses to be included as part of the employee's permanent personnel record.
>
> *This section does not apply to the records of an employee relating to the investigation of a possible criminal offense.*" (Emphasis added.)

Therefore, the Commission determined that under existing law, counties are required to provide a peace officer with the opportunity to review and respond to an adverse comment *if* the comment *does not* relate to the investigation of a possible criminal offense.[54] Under such circumstances, the Commission found that the review and response provisions of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service.

However, even if the adverse comment *does not* relate to the investigation of a possible criminal offense, the Commission found that the following activities required by the test claim legislation were not required under existing law:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, the Commission found that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, the Commission found that when the adverse comment *does* relate to the investigation of a possible criminal offense, the following activities constitute a new program or

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[53] Stats. 1974, c. 315.

[54] The Commission found that Government Code section 31011 does *not* impose a notice requirement on counties since section 31011 does not require the county employee to review the comment *before* the comment is placed in the personnel file.

higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Existing Statutory Law Relating to Cities and Special Districts

Labor Code section 1198.5, enacted in 1975,[55] established review procedures for public employees, including peace officers employed by a city or special district. At the time the test claim legislation was enacted, Labor Code section 1198.5 provided the following:

> "(a) Every employer shall at reasonable times, and at reasonable intervals as determined by the Labor Commissioner, upon the request of an employee, permit that employee to inspect such personnel files which are used or have been used to determine that employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.
>
> (b) Each employer subject to this section shall keep a copy of each employee's personnel file at the place the employee reports to work, or shall make such file available at such place within a reasonable period of time after a request therefor by the employee. *A public employer shall, at the request of a public employee, permit the employee to inspect the original personnel files* at the location where they are stored at no loss of compensation to the employee.
>
> (c) *This section does not apply to the records of an employee relating to the investigation of a possible criminal offense.* It shall not apply to letters of reference.
>
> (d) If a local agency has established an independent employee relations board or commission, any matter or dispute pertaining to this section shall be under the jurisdiction of that board or commission, but an employee shall not be prohibited from pursuing any available judicial remedy, whether or not relief has first been sought from a board or commission.
>
> (e) This section shall apply to public employers, including, but not limited to, every city, county, city and county, district, and every public and quasi-public agency. This section shall not apply to the state or any state agency, and shall not apply to public school districts with respect to employees covered by Section 44031 of the Education Code. Nothing in this section shall be construed to limit the rights of employees pursuant to Section 31011 of the Government Code or

[55] Stats. 1975, c. 908, § 1.

Section 87031 of the Education Code, or to provide access by a public safety employee to confidential preemployment information."[56] (Emphasis added.)

Therefore, the Commission determined that under existing law, cities and special districts are required to provide a peace officer the opportunity to review the adverse comment *if* the comment *does not* relate to the investigation of a possible criminal offense.[57] Under such circumstances, the Commission found that the review provisions of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service.

However, even if the adverse comment *does not* relate to the investigation of a possible criminal offense, the Commission found that the following activities required by the test claim legislation were not required under existing law:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, the Commission found that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, the Commission found that when the adverse comment *does* relate to the investigation of a possible criminal offense, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Existing Statutory Law Relating to School Districts

Education Code section 44031 establishes notice, review and response protections to peace officers employed by school districts. Section 44031 provides in relevant part the following:

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[56] Labor Code section 1198.5 was amended in 1993 to delete all provisions relating to local public employers (Stats. 1993, c. 59.) The Legislature expressed its intent when enacting the 1993 amendment "to relieve local entities of the duty to incur unnecessary expenses..."

[57] The Commission found that Labor Code section 1198.5 does *not* impose a notice requirement on counties since section 1198.5 does not require the city or special district employee to review the comment *before* the comment is placed in the personnel file.

"(a) Materials in personnel files of employees that may serve as a basis for affecting the status of their employment are to be made available for the inspection of the person involved.

"(d) *Information of a derogatory nature, except [ratings, reports, or records that were obtained in connection with a promotional examination], shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon.* An employee shall have the right to enter, and have attached to any derogatory statement, his own comments thereon...." (Emphasis added.)

Education Code section 87031 provides the same protections to community college district employees.[58]

Therefore, the Commission determined that existing law, codified in Education Code sections 44031 and 87031, requires school districts and community college districts to provide a peace officer with notice and the opportunity to review and respond to an adverse comment *if* the comment *was not* obtained in connection with a promotional examination. Under such circumstances, the Commission found that the notice, review and response provisions of Government Code sections 3305 and 3306 do *not* constitute a new program or higher level of service.

However, even when Education Code sections 44031 and 87031 apply, if the adverse comment *was not* obtained in connection with a promotional examination, the Commission found that the following activities required by the test claim legislation were not required under existing law:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, the Commission found that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, the Commission found that when the adverse comment is obtained in connection with a promotional examination, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

[58] Education Code sections 44031 and 87031 were derived from Education Code section 13001.5, which was originally added by Statutes of 1968, Chapter 433.

CONCLUSION

Based on the foregoing analysis, the Commission concluded that the test claim legislation constitutes a partial reimbursable state mandated program pursuant to article XIII B, section 6 of the California Constitution for the following reimbursable activities:

1. Providing the opportunity for an administrative appeal for the following disciplinary actions (Gov. Code, § 3304, subd. (b)):
   - Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e.; the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
   - Transfer of permanent, probationary and at-will employees for purposes of punishment;
   - Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
   - Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.
2. Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
3. Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)
4. Tape recording the interrogation when the employee records the interrogation. (Gov. Code, § 3303, subd. (g).)
5. Providing the employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories (Gov. Code, § 3303, subd. (g)):
   (a) The further proceeding is not a disciplinary action;
   (b) The further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e., the charges supporting the dismissal doe not harm the employee's reputation or ability to find future employment);
   (c) The further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;
   (d) The further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;
   (e) The further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.
6. Producing transcribed copies of any notes made by a stenographer at an interrogation, and reports or complaints made by investigators or other persons, except those that are deemed

confidential, when requested by the officer in the following circumstances (Gov. Code, § 3303, subd. (g)):

(a) When the investigation *does not* result in disciplinary action; and

(b) When the investigation results in:

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e., the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
- A transfer of a permanent, probationary or at-will employee for purposes of punishment;
- A denial of promotion for a permanent, probationary or at-will employee for reasons other than merit; or
- Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career of the employee.

6. Performing the following activities upon receipt of an adverse comment (Gov. Code, §§ 3305 and 3306):

School Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then schools are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Counties

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then counties are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Cities and Special Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then cities and special districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

EXHIBIT A

PUBLIC HEARING

COMMISSION ON STATE MANDATES

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CERTIFIED COPY

TIME: 9:45 a.m.
DATE: August 26, 1999
PLACE: State Capitol, Room 437
Sacramento, California

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

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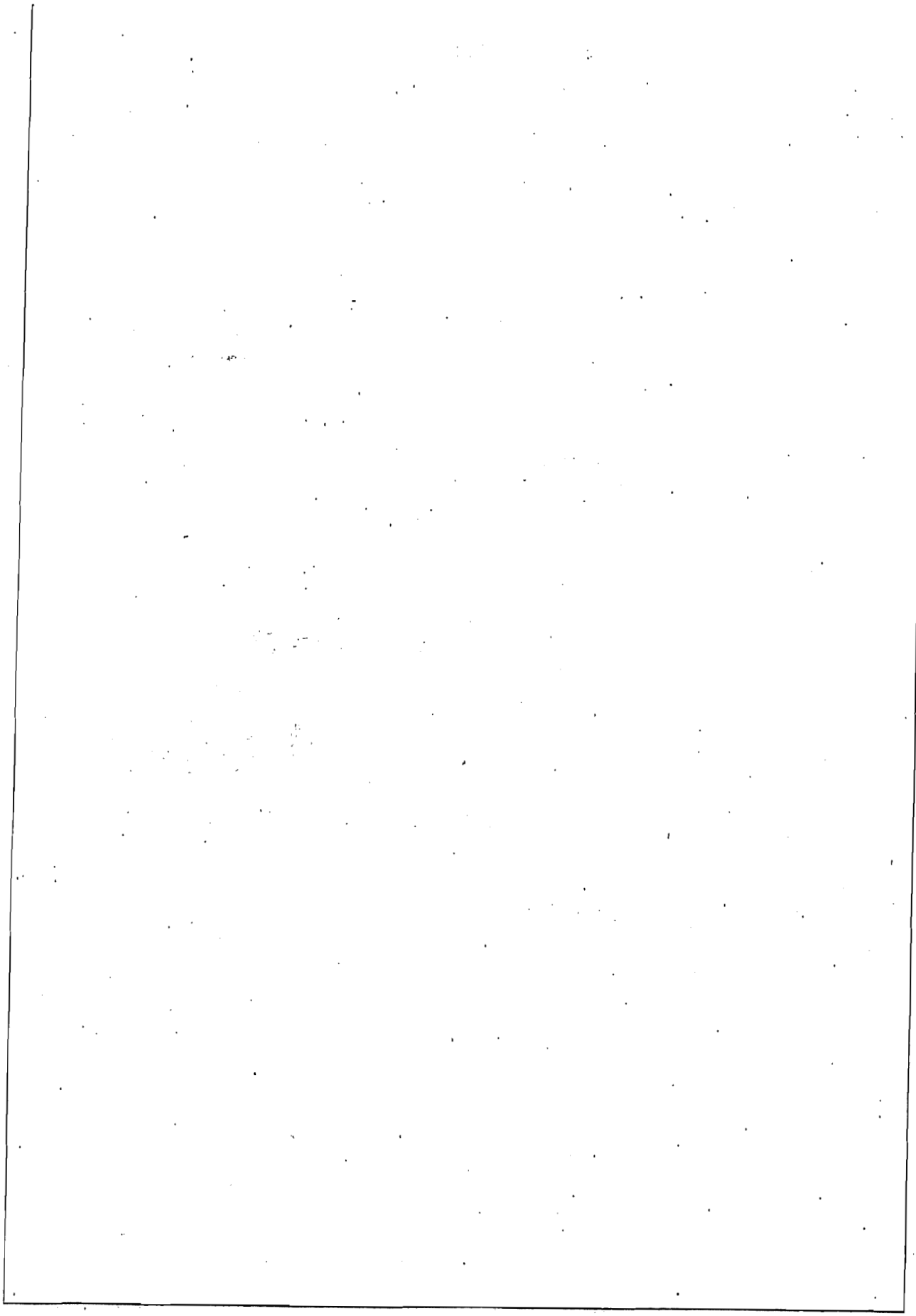
Reported By: STACEY L. HEFFERNAN CSR, RPR
No. 10750



A P P E A R A N C E S

COMMISSIONERS PRESENT

ANNETTE PORINI, Chair
Representative for B. TIMOTHY GAGE, Director
State Department of Finance

ALBERT P. "AL" BELTRAMI
Public Member

MILLICENT GOMES
Representative for Loretta Lynch, Director
State Office of Planning and Research

D. MICHAEL FOULKES
Representative for KATHLEEN CONNELL
Deputy Controller, Legislation

BRUCE VAN HOUTEN
Public Member

JOANN STEINMEIER
Public Member

COMMISSION STAFF PRESENT

PAULA HIGASHI, Executive Director

PAT HART JORGENSEN, Chief Legal Counsel

CAMILLE SHELTON, Staff Counsel

PIPER RODRIAN, Staff Services Analyst

PUBLIC TESTIMONY

JAMES A. CUNNINGHAM, Legislative Mandate Specialist
San Diego City Schools, Education Center

CAROL A. BERG, Ph.D., Executive Vice President
School Services of California, Inc.

JAMES M. APPS, Principal Program Budget Analyst
State of California, Department of Finance

JOSEPH SHINSTOCK, Assistant Budget Analyst
State of California, Department of Finance

ALLAN BURDICK, CSAC, League of Cities' Advisory on State Mandates

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A P P E A R A N C E S

PUBLIC TESTIMONY

ELIZABETH S. STEIN, Staff Counsel
State of California, State Personnel Board

MARCIA C. FAULKNER, Manager, Reimbursable Projects
Office of the Auditor/Controller-Recorder

DEE CONTRERAS, Director of Labor Relations
City of Sacramento, Office of Labor Relations

EDWARD J. TAKACH, Labor Relations Officer
City of Sacramento, Office of Labor Relations

PAMELA A. STONE, Senior Manager/Legal Counsel
DMG Maximus

LEONARD KAYE, Certified Public Accountant
County of Los Angeles

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AGENDA INDEX

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All those in favor indicate with "aye."

(Affirmative Response by Several Commission Members.)

CHAIRPERSON PORINI: Opposed?

(No audible response.)

CHAIRPERSON PORINI: All right. That whittles down our agenda significantly.

MS. HIGASHI: This brings us to Item 2, which is the test claim hearing on the Peace Officers Procedural Bill of Rights.

Camille Shelton, of our staff, will present this item.

MS. SHELTON: Good morning.

This is a test claim filed by the City of Sacramento. The test claim legislation provides procedural protection to peace officers employed by local agencies and school districts when a peace officer is interrogated by the employer is facing punitive action or receives an adverse comment.

All parties agree that the test claim legislation imposes some of the notice and hearing protections to employees that are required by the due process clause of the United States and California Constitution.

The Commission has required to analyze this connection between a due process clause and a test claim legislation in order to determine that the activities required by the test claim legislation constituted a new program of a higher level of service and to determine whether those activities impose costs mandated by the state; however,

the parties dispute how far the due process clause goes and when the requirements of the test claim legislation kicks in.

The main issues in dispute are bulleted on pages A-2 and A-3 in the Executive Summary. Staff recommends that the Commission approve the test claim for the activities identified on pages A-3 through A-6 of the staff analysis.

Will the parties please state their names for the record.

MS. STONE: My name is Pamela Stone. I'm here on behalf of the City of Sacramento.

MS. CONTRERAS: Dee Contreras, Director of Labor Relations for the City of Sacramento.

MR. TAKACH: Edward Takach, T-a-k-a-c-h, Labor Relations Officer of the City of Sacramento.

MR. BURDICK: Allan Burdick on behalf of the California Cities' SB 90 Service.

MS. STEIN: I'm Elizabeth Stein. I'm staff counsel representing the State Personnel Board.

MR. SHINSTOCK: Joseph Shinstock representing the Department of Finance.

MR. APPS: Jim Apps with the Department of Finance.

CHAIRPERSON PORINI: All right.

Do we need to do any swearing in of our witnesses?

MS. HIGASHI: Yes, we do.

Will all of the witnesses please raise their right hand:

Do you solemnly swear or affirm that the testimony which you're about to give to the Commission is true and

correct based upon your personal knowledge, information or belief?

(Unanimous affirmative response by the witnesses.)

MS. HIGASHI: Thank you.

MS. STEIN: Good morning Madam Chairman, Members of the Commission. Our presentation is going to start with Ms. Dee Contreras, who is the Director of Labor Relations for the City of Sacramento; and we're all available here to answer any questions your Commission may have.

CHAIRPERSON PORINI: Thank you.

MS. CONTRERAS: By way of background, I've been involved with labor relations for the city for a little over nine years and I've been director for the past four. Before that, I was a labor relations representative, and I was the person assigned to the police department, so I was involved with police discipline matters and intimately involved with the activities that are involved with POBOR here.

And Ed is my senior staff, who is currently assigned to the police department, who has been dealing with them since I left and also has a background in law enforcement, having been a police officer himself in the past, so he is also familiar with and has been representing both employees and the management side, in terms of police departments, for in excess of ten years now.

The City of Sacramento is not a particularly large jurisdiction, as the state goes, but we do have a relatively active Internal Affairs Department, processing somewhere in the neighborhood of 80 cases a year and performing hundreds

of Internal Affairs' interviews a year. So the impact of this legislation, if it has any impact at all in the I.A. process, is substantial, when you start looking at that.

As a small department, we generally have three sergeants who are assigned to Internal Affairs. And we're talking about hundreds of interviews, so the impact on people and their jobs is substantial. And we actually implement 40 or more police disciplines a year.

We can have active years in which one complaint -- one complaint resulted in 67 disciplines related to that specific, single case. So when we say 80 cases, that doesn't mean 80 people are involved, it could be significantly more than that, who wind up being reviewed in the course of that process.

It's important to distinguish the things that are required by Skelly and due process, and we recognize that those things exist outside of the requirements of POBOR, but they first require a property interest in the job. The reason the public employer has those mandates and those requirements is because when public employment, when it is career or permanent or whatever the title the entity gives it, is given to people, it is presumed that a property right attaches to it and that employment will continue unless something serious happens. And then, because we are a public jurisdiction, we are required to give them due process in order to allow them to defend their property interest in their job.

By definition, that means employees with no property

interest don't have those rights. And, yet, POBOR mandates those rights, in terms of all sworn police officers. So all sworn peace officers is what the statute uses.

POBOR -- excuse me, Skelly and due process require a fact-finding investigation, always a good practice, notice and opportunity to the person who is being disciplined, if they are disciplined. There is no requirement to provide information to an employee who, as a result of an investigation, is not disciplined, but there are situations in which POBOR requires, in fact, that they be given information that would not otherwise be -- they would not otherwise be entitled to.

Skelly does not apply, as I said, to probationary and at-will employees, and it does not arise for reprimands or suspensions of short duration. The Skelly case itself involved a termination, but, as you know, decisions like that are reinterpreted by the courts regularly. And there are cases that indicate, for example, suspensions of five and possibly even 10 days do not require the same protections as does Skelly. So there's some question as to where those rights arise.

In the City of Sacramento, letters of reprimand do not require that we provide information to the employee. They don't get a Skelly package in the city. We don't issue an intent letter. In normal discipline, under Skelly, you issue an intent letter that says, "This is what we're going to do. You have a Skelly hearing, which is a review process, an informal review, prior to the implementation of final

discipline."

And, the city, we then issue a separate, final discipline letter that varies by jurisdiction. But, in the local entities, when you talk about what the impact this has on cities, counties, local jurisdictions, agencies, JPAs, Joint Powers Agencies/Administrations, those are all public entities, there are hundreds, perhaps thousands, of them in the State of California that are impacted by this, if they have peace officers working in those jurisdictions, as do most cities and counties.

As a practical matter, it doesn't apply for us, in terms of reprimands, absent POBOR, and POBOR creates some greater rights in those areas. There's no obligation, in a normal interview, to notify the person of what it is you're investigating. We can call in, and do, miscellaneous employees in the City of Sacramento and begin an investigation, a fact-finding process, without telling them what it is, what the complaint is, what it is we're looking for, what it is we're going after.

You can't do that with peace officers. You have to notify them what it is you're investigating, what the complaint is about. It becomes complicated, because, if you give them the name of the complainant, you create other problems as you go through this process.

So, as you can see, it's much more sensitive and creates a greater burden. It substantially increases the burdens on the local government, in terms of the right to know, the nature and area of the investigation. It also

hampers the investigative process, because, when you give a person information before that you get -- before you are allowed to interrogate them, it allows them an opportunity to create, reflect or refresh facts that might have come out differently in a straightforward investigation where they didn't know what it is you were looking for or at.

There's a limitation on the number of interrogators you can have with the employee at a given time, which can impact your investigation and can make a difference, in terms of the kinds of questioning that goes on.

They have a right to a transcript of a prior interview before there's an additional interview. That can -- if you are interviewing a large number of people and you reinterview the employee after you've interviewed intervening witnesses, that that means if you are taping you have to, in essence, re-transcribe the process. And I'll talk about taping a little bit more in a second.

They have a right of review for at-will employees. POBOR creates protections up to the level of the Chief of Police. I'm not sure that, when the Legislature did this, they intended to protect Chiefs of Police in the City of Sacramento.

Our current police chief, for example, who never worked as a civil service employee in the City, has no right, whatsoever, to return to any other classification and is an at-will employee. By that, in the normal context of law in the State of California, he can be released for any reason or no reason, as long as it's not an illegal reason, and that's

the end of his employment.

On the other hand, he has POBOR rights which gives him substantially greater rights than he would have as an at-will employee. In fact, in a major dispute with some employees who may, some day, be managers, their biggest concern is: They want a definition of an administrative review process that will be mandated for POBOR managers, should they become managers, because they know what their civil protections are.

And it's been an interesting struggle to try and deal with them on that issue, because this right is so sacrosanct with them, that they're not willing to give it up; and they see it as an integral part of their ongoing job rights. And we've tried to deal with that in a variety of ways, but the practical matter is: There is an impact of this statute, and the impact flows, in terms of what we're required to do.

There are impacts beyond discipline in that it affects transfers, whether or not there's a financial impact from the transfer. We have no such thing in the City as disciplinary transfers. They don't exist under the civil service rules; they don't exist in any other process.

But, if we discipline somebody and also transfer them from their assignment, we are now in a position where we are compelled to treat that as if it is discipline and to, in essence, give them some sort of a third-party neutral review of the transfer, the same as if it were a normal discipline.

In fact, in the latest incident of that, we treated

it as if it was part of the discipline process instead of separating them out, because the city attorney was very concerned that we would wind up in a situation where we would have quite a bit of litigation over what POBOR rights are. The law says "punitive transfers," but what's a punitive transfer is in the eye of the beholder.

I received this morning -- apparently, you've received a DPA case, which has no precedential value, by the way, at the local government level, that says that a transfer is in the eyes of the beholder, an employee -- if this is an issue of fact. Well, an issue of fact, where you have no process, means you have to litigate all those issues. That's a burden that is difficult for the employer, and, again, exists only because of this statute.

Employees often see operational moves as punitive. If they don't like the reorganization of the department, if they don't like going to neighborhood policing, if they believe going to neighborhood policing requires a 75-percent increase in the number of police officers in the city, as remarkably not our association did, then they don't see, when you do it, that it isn't punitive when you start assigning people. Those become struggles on a day-to-day basis that should not occur and do occur because of the impact of this.

Probationary employees have a review right that goes beyond a liberty interest. A liberty interest arises when the employer releases somebody on probation for reasons that basically impugn, in a significant way, their character such that they would have difficulty getting another job. If

I released you for dishonesty or theft, for example, that would apply.

In the City, we don't ever release anybody for any stated reason. We have a letter which says, "You're being released because you failed to meet the requirements of the position during the probationary period. Thank you very much. Have a happy life. Love, Dee." That's basically what the letter says. And the unions regularly object to it.

As I said at the beginning of this, we have very strong language in our city charter regarding our rights during probation, and we don't intend to, in any way, reduce them; however, we regularly have a review of probationary officers who fail as police officers. And probably, based on recollection, 80 or 90 percent of them actually come through and request a review and discussion of the basis for it, and they go over all the documents that were in their file.

It creates an obligation for us to document and justify our decision-making process during probation, which is unnecessary, and, in fact, is in conflict with the concept of probation, to have to defend that decision at the end of the line, particularly given the kind of language we have in our charter.

The right to tape creates an obligation on the agency to, in fact, tape interviews. And I know that it can be argued that it doesn't; however, let me try and articulate the problem you face, in reality, as a local jurisdiction.

In the State of California, you don't have the right to tape somebody without their permission. So, in essence,

with every employee, except sworn peace officers, we can say, "No, you can't tape this interview. Take notes." And we take notes and they take notes. And -- or we can tape and they don't have to have a copy of it, but, if we transcribe it and do discipline, certainly we would give them that copy, but we take notes and they take notes.

If the employee comes in and tapes, and, trust me, they all come in and tape, if they're sworn peace officers, their attorneys come in with tapes. You wind up with two tape recorders on a desk. If they tape and we do not, then they have a record that we do not have or we must rely on a tape created by the employee we are investigating. That would not be a wise choice, from the employer's perspective.

If we take notes and they tape, our notes are never going to be exactly the same as the tape is going to be if it's transcribed, so we wind up with what is arguably an inferior record to the record that they have.

So it is essentially -- it says they may tape but the practical application of that is: For everybody who comes in with a tape recorder to tape, which is virtually every peace officer, we then must tape. And, if we tape, we, then, if we're going to reinterview, transcribe.

In the case that I discussed earlier, which everybody agrees is an anomaly, one complaint we had -- 200?

MR. TAKACH: 240.

MS. CONTRERAS: 240 people were interviewed in the course of one investigation and 67 disciplines flowed from it. You can imagine the complication of going back and

reinterviewing people when you have 240 sets of transcripts to transcribe in order to get information you needed before you could reinterview those people as they went.

Some people who were intimately involved in the problem, in that particular case, you only had to give them their transcript at that point in time, but, in order to ask questions about other people's transcripts or questions or statements, and to be clear and specific and fair to the employee, you basically had to do that. We had transcribers basically running 24 hours a day trying to keep up with the taping process in that interviewing parade that came out of that one complaint.

So it's not that we can tape or we choose to tape. I think anybody who's ever presented a case in front of an arbitrator would acknowledge that we must tape if the employee does. Otherwise, we go to a hearing with a record that is inferior to the record that the employee has.

In the local government, POBOR also requires a right to respond to adverse documents. And, while that sounds simple, it creates an obligation to process, file and maintain those responses and attach them to the correct document and make sure they get into the file. Generally, it also requires some administrate review and to discuss the response of the employee.

I have seen responses to documents in which the employee wrote pages and pages and pages of information and/or questions. And so it requires a substantial amount of time to respond to that. That doesn't exist anywhere except

here.

Reprimands in the City are the most common form of discipline. They are probably 25 to 35 percent of what we do in any given year. The fact that we have to provide an administrator to review for those is an additional burden. The fact that we have to maintain the kinds of recordkeeping that are involved in presenting that information is a substantially greater burden than what we have otherwise.

We realize that there are a variety of impacts on local government that are raised by the discipline process as it exists without POBOR. And you have to do, for example, what's compelled, in terms of your own rules, and that varies from organizations.

As I said, we don't have disciplinary transfers. I'm sure there are many jurisdictions where the Civil Service Rules includes those things. You know, reprimands used to be covered by the Civil Service Rules in the City of Sacramento. They were negotiated out, in terms of dealing with the union, so that they don't -- are no longer covered by it.

In many jurisdictions that I've dealt with in the past, reprimands are not considered formal discipline, at all, even written reprimands. Those are activities that the local entity is allowed and should be allowed to decide. And the impact of this legislation is that we are required to provide additional rights to people, and that necessitates -- of necessity impacts staff, time, documentation and recordkeeping for all of those things.

So to the extent that the staff recommendation

acknowledges the additional burden placed on local government, by that, we would concur. I still have concerns that the at-will peace is not recognized in its totality, because, again, our police chief is a good example.

Our Civil Service Rules give every other police manager in the city -- in fact, if we were going to terminate them, the right to revert to the bargaining unit, they basically leave their exempt employment, go back to their last civil service status and then we fire them. So it's kind of a two-step process.

Under the Civil Service Rules, they carry some sort of historical perspective, and that's true of all employees. I've never worked at the city as a civil service employee, so I don't have that protection. Somebody in my position who did, who came up through the ranks that had been in civil service previously, would, in fact, be able to revert back and have a hearing at that point.

But, in fact, they are all at-will employees. And, short of termination, they have, under our system, no right to appeal a discipline or to respond or to address discipline because they have no property interest in their management jobs. And, yet, POBOR gives them that.

So I add that as an additional concern beyond the staff recommendation. But we appreciate very much the work that the staff did, in the fact that they waded through what is, what I think, very arcane, difficult law that only somebody who has to deal with every day can appreciate, found that, in fact, the burden on cities, counties, and school

districts is substantial and does exist such that it's a mandate from the State.

Thank you very much.

CHAIRPERSON PORINI: All right. Questions?

Next witness.

MR. TAKACH: No, not yet.

CHAIRPERSON PORINI: All right. Then should we go with the Department?

MS. STEIN: I just have a few brief comments. I'm Elizabeth Stein representing the State Personnel Board. We addressed our comments in the letter to the staff. I'm just going to address a few things.

First, as far as the City of Sacramento's comments to the staff, we believe that written reprimands are entitled to due process protections, that the state laws give those protections to people who receive written reprimands, mostly because of the Stanton case, Stanton v. State Personnel Board; and staff addressed that case.

And, in that case, there is clear language that due process protections -- that due process rights are covered by POBOR and that POBOR is consummate with the due process protections. And staff cites that case, and we agree with staff's analysis.

As far as the tape recordings, as a practical matter I can see the problems that local governments have, having to provide tape recordings for those interrogations, but I think, as a matter of law, if it was litigated, they would probably lose on that issue, because, as staff also points

out in their analysis, the case law says that if it's not a mandated activity, something that local government may do, that they are not entitled to reimbursement.

As far as things that we brought up in our letter, the State Personnel Board, there's only two things, at this point, I'd address. One is: I understand that the Commission just looks at the legislation, POBOR, as it existed when the test claim came up, but I think it's inherently wrong if you don't recognize the amendment to the statute.

Courts, as a matter of course, will take judicial notice of changes in the laws. And, right now, as of December '98, there is no mandate by the State, under POBOR, to give these appeal process rights to probationary -- to people who have not passed probation, permanent employees; and to not recognize that, I think, would be wrong. It'll come out at some point, I would imagine, if the test claim is either amended, but it just seems that the Commission should be able to recognize that and provide that the State is no longer required to provide reimbursement for probationary employees after December '98 when it was amended.

The other concern would be: If you go back and you try and sort out which probationary employees who've been disciplined have been disciplined for things involving liberty rights, who's going to make that determination? It's usually a determination made by courts and judges.

So, if you go back and seek reimbursement for an appeal process that a probationary employee enjoyed because

of POBOR, you'd have to look at whether or not a liberty interest was involved, because this is something stigmatizing a reputation, because those people who are fired because of something that will stigmatize their reputation are still, as a matter of due process, entitled to an appeal process. So that's just another thing I think the staff should -- the Commission should look at when dealing with that issue.

As far as the disciplinary transfer cases, I don't think the law is as clear as the City contends. There are many jurisdictions. The State, all the time, has cases of transfers that are clearly designated as disciplinary. And, in those cases, the State does provide for due process protections.

And we think the Runyon case and the Howell case cited by the staff in their analysis are not clear, saying that disciplinary transfers -- people that are transferred for disciplinary reasons are not entitled to due process rights. We think that there's a real question that, perhaps, they are. And the State has recognized that in its own precedential decisions.

That's all I have right now.

CHAIRPERSON PORINI: Questions? Department of Finance, do you --

MR. APPS: No. We have nothing, really, to add at this point.

CHAIRPERSON PORINI: All right.

MS. STEINMEIER: I do have something. I would like to ask staff to address, particularly, the last comment by

Mrs. Stein about the due process rights, particularly as they relate to transfers.

Do we have something in the analysis or would you like to --

MS. SHELTON: We've addressed that on page A-11, in the second and third paragraphs. Basically, it's in your binder or -- I don't think it's going to be in the blue volume.

MR. BURDICK: Okay.

MS. SHELTON. We found two cases dealing with -- discussing transfers. One was the Runyon case. And, in that case, the peace officer did receive a transfer plus an accompanying reduction in pay. And, in that case, the court did find that the officer was entitled to due process protection.

We could not find any cases where the officer was just transferred alone, without any accompanying reduction in pay or reduction of classification, or anything like that. There was always something tied to the transfer.

The one, as Ms. Stein pointed out, we did find was that Howell case. And, in that Howell case, the court does state that: "An employee enjoys no right to continuation in a particular job assignment." So, from that language, we interpreted that an employee, a permanent employee, does not have due process rights for a pure transfer; and that POBOR, in that case, would go beyond and constitute a new program, if it's just a pure transfer.

CHAIRPERSON PORINI: Any other response?

MS. STEIN: My response to that would be that Runyon did involve the reduction in pay, in addition, but it's our opinion that the disciplinary transfer, itself, is certainly as harsh as a written reprimand, which is entitled to due process, that staff acknowledges. And if -- the court didn't say that -- it was just silent, as to the issue of a disciplinary transfer alone.

As far as Howell, it dealt with the issue of a good cause for a late filing. And they never made the determination that the transfer was, in fact, disciplinary in nature. It was going back to the lower court to figure that out, so I do not think that the case law prohibits due process rights for a disciplinary transfer.

The State has recognized those rights for its employees and believes that -- it's still an open question. I think if a court was to address it, that the court would come down on the side of giving due process protection to those people, because it's discipline in nature. It's certainly as harmful to one's reputation in the file as a written reprimand, which does provide for due process protections.

CHAIRPERSON PORINI: All right. Mr. Beltrami?

MR. BELTRAMI: Ms. Stein, how would you respond to the point that was made in the instance of the Chief of Police, for instance?

MS. STEIN: Well, I suppose it depends on the -- the Chief of Police, if they're a permanent employee, is entitled to the same due process protection.

MR. BELTRAMI: Well, he's an at-will employee. He works for the County. Council should have the right to terminate without any reason, at all.

MS. STEIN: Well, we did not address that issue, and, so, in the State, there's been a court case that CEAs, which are sort of the state equivalent, the Career Executive Assignments, do not enjoy due process rights.

MR. BELTRAMI: We're familiar with that.

MS. STEIN: I'm sure you are.

So we would concede, probably, that they don't enjoy that, at least the Personnel Board, because that has been litigated on a state issue, on a similar sort of issue.

MR. BELTRAMI: Ms. Contreras, I thought that the Personnel Board made an interesting argument, and, that is, that this is really good for you because it tightens up things so well, and, therefore, it's going to save you money in the long run rather than cost you money.

Would you comment on that?

MS. CONTRERAS: We were discussing that issue in the hallway. It's funny you should ask. And I said that, "To the extent anybody thinks that this law, in particular, or that legislation, in general, creates harmony and improves processes, they are naive in the extreme."

In fact, the amount of hostility and fighting that goes on about issues like whether or not you can transfer people, whether or not you have the right number of people in an interview room, whether or not you get transcripts soon enough, we're having a struggle right now in the City of

Sacramento.

The initial contact process with Internal Affairs is what we call the blue sheet. It's mimeoed on blue paper. You know what the complaint is, who the officer is, who it involves, what the substance of the complaint is. And it used to be a way of introducing the employee to the investigation.

When they came in, we basically gave them the blue sheet. We showed it to them. They couldn't take it or copy it or anything, but they could look at. And then we got into fights with counsel for the employees about whether or not the blue sheet said what the questions they were asking related to, or, "Who was the person who filled it out? Well, who wrote that? Who filled that out? There's two handwritings on this piece of paper." So we stopped showing them the blue sheet.

And now we're in the middle of what will -- what could very well wind up in arbitration, the issue of whether we changed our practice by now reading the blue sheet to them but not showing it to them so they don't get to see the handwriting. That blue sheet exists because of POBOR. I mean, we struggled continuously about whether the employees' perception of whether they are getting all the rights that they're entitled to, to say nothing of the fact that the law itself has continued to expand.

At one point, what was required was some sort of administrative review of the process. Now, our unions believe that everything we do is subject to third-party

neutral review. We have to arbitrate everything. They want to take it through civil service or to an outside binding arbitration process or to court. So, no, it hasn't created good will or a tighter process or help the relationship in any way.

I think legislation rarely does that. But, in this case, it has served to do exactly the opposite. It is a weapon used by employees and their union against the employer, and it's a continuous threat, in terms of whether or not we're going to comply. We rarely -- I'll be honest with you, we rarely are threatened by it; and we have been in court more than once with employees who've decided that they didn't like the way we were doing business and they were going to take us to court. And, typically, we prevail because we do what is required of us, but, no, it hasn't helped the process. Thank you.

Thank you for asking.

MS. STEINMEIER: I have a comment.

CHAIRPERSON PORINI: Yes, Ms. Steinmeier.

MS. STEINMEIER: There are some parallels between peace officers and teachers that I'm hearing through your -- school districts have this problem with teachers, so I understand. And I know the laws were designed to protect, and sometimes maybe overprotect, and I do appreciate the staff analysis. It does not create a happy situation. In fact, it creates a contentious situation. And I have empathy for that. So I do agree with most of the staff analysis.

On the question of taping, we have a standard, here,

about reasonableness. Even if the law says "may," if it's almost required by the nature of doing business in this case, if the employee tapes, the employer must. I mean, you can't end up not having your own record, so I would be inclined to agree with the claimant on the taping issue.

The other one on written reprimand is not as clear to me. I guess I buy the argument that it is a due process. Anytime you put something in someone's personnel file that is negative about them, regardless of state law, I think that the constitution does imply, if not actually require you, to allow them to know what it is and to respond to it, if they want to. So I don't see the first one as being -- the one on written reprimand as being something that flows from the state law. I think it flows from the Federal Constitution.

But, on taping, I don't know how the rest of you feel, but I'm compelled to believe that it's a requirement, even if the law says "may."

MS. STONE: Madam Chairman, I'd like to address the -- this is on the issue of written reprimands. When you're addressing the issue of written reprimands, you have to take a look at what's required under POBOR and compare that with what is required when you're not dealing with a peace officer employee.

In my prior incarnation, I was responsible for disciplining both miscellaneous that were civil service, as well as attorneys that were at-will, and it was like herding cats. I don't know how else to explain it. When you're

issuing the written reprimand, there is no requirement that the individual be given the right to respond or make any comments to it, at law.

In fact, the Stanton case, I'd like to -- in your materials at page 311, it goes through and does an analysis. And I know that Ms. Shelton disagreed with me and that's fine. It goes through and does an analysis of what is required for written reprimands under POBOR.

First from the standpoint of procedural due process, and, in this particular matter, if you'll notice on page 311, it's about the fourth paragraph down on the left-hand side, the court says: "As the city notes, no authority supports plaintiffs,'" that would be the employees, "underlying assertion that the issuance of written reprimand triggers due process. Said parts outlined in Skelly."

And it goes on and says here, "Skelly applies in all these certain situations." And, on the bottom, it says, "We find no authority mandating adherence to Skelly when a written reprimand is issued." And then it goes on to say, "By the way, you've got protections for written reprimands under POBOR," and that it went through and did an analysis to ascertain whether, in this instance, the administrative procedures, under POBOR, were sufficient for a written reprimand. So it's very clear to us, and, in no other circumstance, does a written reprimand rise to the level of the Skelly. It is only with POBOR that the individual employee has a right and ability to comment.

I note that the State Personnel Board has made other

mentions about what their particular practices are; however, what the State has voluntarily chosen to do with respect to its employees is separate and apart from what the constitution requires, because that's what we're looking at, so that's our concern with respect to written reprimands.

If this particular Skelly-type requirement would be imposed on every miscellaneous employee, it -- or nonsafety members, the amount of work that would be required would be phenomenal. Then, for example, Skelly does not necessarily cover suspensions of less than five days. Well, if it doesn't cover a suspension of less than five days, a written reprimand, which is much less on the hierarchy of discipline, should also not be covered.

CHAIRPERSON PORINI: Other questions? Mr. Foulkes.

MR. FOULKES: I don't know if this is for staff or for the folks from Sacramento, but the issue of written reprimand versus, as in the staff recommendation, "adverse comment," and what is the difference between those and how does that play into this? Because we had some concerns in reviewing that. Perhaps, the word choice was --

MS. SHELTON: That's a good point. We discussed that amongst staff, too. The language in the statute says "adverse comment" and it doesn't tie it back to a written reprimand. But I would imagine in practice, and maybe Ms. Contreras can address your question a lot better than I can, that there are times when an adverse comment equates to a written reprimand. I would imagine that to be true. You might ask the parties about that.

And that's why we clarified in the staff analysis, that, even in those cases where it does, if it does equate to a written reprimand, we found that with written reprimands due process would actually apply. So, in those cases, you would have a limited -- the activities would be -- the reimbursable activities would be unlimited, not just the two.

CHAIRPERSON PORINI: Comment?

MR. TAKACH: Yes. The City of Sacramento, the Police Department, issues something lower than a written reprimand called a documented counseling, which remains in an officer's file generally for a -- it's called a watch file, generally for a period of a year until they move to another assignment.

We believe that there's a right to respond to that comment under the law. Now, written reprimand is above that, which remains in their file through our own practices as formal discipline, but they have the right to respond, even to that adverse document, which is a documented counseling of you spent too much time at a coffee break. I mean, it can be that simple. They get the right to respond to it because it's in their file.

MS. CONTRERAS: Let me play on that. Watch file means shift file not watch this person's file. For those of you who are not familiar with police terms, there were three watches and that means shifts, so the watch file is not a warning file about a bad person; it is basically the supervisor's working file, typically, is what a watch file amounts to. It doesn't become part of their permanent

personnel file. In fact, they're purged regularly.

MR. TAKACH: We have one challenge under POBOR that an adverse comment -- which was a complaint by either a departmental employee or a citizen which generated an Internal Affairs' complaint which did not result in discipline. There was a transfer but was rescinded, so there was no adverse action taken to the employee, other than there was this complaint in an Internal Affairs' file, not his personnel file, as stated in other pieces of statute. But there was -- the challenge to that, just being in the Internal Affairs' file, to want to get that out or to respond to that.

MS. CONTRERAS: Let me comment on that. That case went to court; and the union's perspective was that he had a right to -- what the employee sought was the complaining document which was written by a superior officer. And in what, from our prospective, amounted to a personal angry response to the person who filed the document, since no discipline was forthcoming. He believed that it was done, you know, on an individual, personal basis maliciously, and so we wound up in court on that case.

Now, the judge chose -- did not issue a TRO, chose not to -- basically told the parties that they should go settle this, because there is no case law that extends where they were going. But, again, based on the language of POBOR, under a normal circumstance, that would have been a, "Yeah, right. So what?" kind of response, but we wound up in front of a judge.

We settled the case reading onto the record a settlement proposal we tried to make, but that settlement basically reinstated some of the employee's rights because there was no subsequent investigation -- I mean, no discipline out of the investigation. We would have gone there anyway, but we had to resolve it in court rather than doing it in the normal course of events because of POBOR. Their belief that that complaint -- not anything that was ever in his personnel file, the fact that somebody had complained about him, we investigated it and took no action based on it, was sufficient to generate POBOR, right to review under the documents.

MS. STONE: Madam Chairman, there's also some materials in the response to the draft staff analysis that talk about how, if there is citizen review boards that do an investigation and come up with findings that do not necessarily lead to discipline, the courts have found that those findings of citizen review boards, in jurisdictions which have them, can constitute an adverse comment even though there is no discipline intended by it, and, therefore, the officer is entitled to respond to these particular filings which just exist and are not necessarily included in their personnel file.

CHAIRPERSON PORINI: All right.

Ms. Stein?

MS. STEIN: Yes. I just wanted to add, if it's helpful, that the state system designates reprimands as discipline, and you have all these informal types of

discipline, counseling memorandums are often referred to or informal discussion memorandums, you know, citing different behaviors that occur.

But if it's titled a reprimand, if a state calls it an official reprimand, then it becomes discipline. It requires notice under the Skelly provisions, and that's how the state differentiates it, and it sounds like the local governments do something similar. No?

MS. SHELTON: I thought I heard the city say something a little bit different. The way staff wrote the analysis was identical to what Ms. Stein was just saying. And I think what the city is saying, and correct me if I'm wrong, is they see it as two different steps: One, an adverse comment, and that that does result in something else, like, whatever, another disciplinary action, and then they go through whatever steps are required at that stage. So, if they're duplicative, they're duplicative.

Is that correct?

MS. CONTRERAS: Yeah, I think it can. And the right to respond exists to things much less than formal discipline.

CHAIRPERSON PORINI: Yes.

MR. BELTRAMI: Camille, what about the comment that Ms. Stein made about the amendment of December '98? Does that take the probationary focus out of the system?

MS. SHELTON: It does affect -- yes, as of January 1st, 1999, but, until that time, they're included. The amendment was made in 1998 and became effective January 1,

1999, so, up until that date, probationary and at-will employees were entitled to administrative appeal until December 31st, 1998.

MR BELTRAMI: Thank you.

CHAIRPERSON PORINI: All right.

Yes, Mr. Foulkes.

MR. FOULKES: One last one. In the language that talks about providing prior notice to peace officers regarding the nature of the investigation, correct me if I'm wrong, but isn't that required now, not prior notice but subsequent notice?

And the question is: If you have to give the notice and the timing is changing but the notice isn't changing, is that adding additional duties or not?

MS. SHELTON: Are you talking about what the receipt of a written reprimand is?

MR. FOULKES: Um --

MS. SHELTON: Or what page?

MR. FOULKES: Yeah. I'm talking about page A-29, No. 3, under the staff recommendations.

MS. SHELTON: You're talking about the third activity under the conclusion and staff recommendation?

MR. FOULKES: Right.

MS. SHELTON: Staff found that that was a new program or higher level of service because notice is required before any disciplinary action is -- I mean, misconduct is charged, so it's notice prior. I mean, this is a requirement before they even get into the due process rights.

MR. FOULKES: Okay. So that they would still be required to send the notice after?

MS. SHELTON: If it results in disciplinary -- if the interrogation results in a disciplinary action, right.

MR. FOULKES: Okay.

MS. CONTRERAS: I think that notice refers to what I call the blue sheet. We have to tell them, at the commencement of an investigative interview, why we're talking to them, as opposed to the normal process where you just start talking to them and asking them questions about where they were yesterday.

I mean, if the complaint is that -- you have to say, you know, "There's been a complaint that you were parked outside the city limits." So then -- and, normally, you'd say, you know, "Where were you on Wednesday the 21st? Where were you yesterday? Where did you go here? Where did you go there?" You can ask all kinds of questions.

And, if they never get outside the city limits, then you can say, "Gee, why, in that case, did the city manager see you park at a liquor store in West Sacramento last Tuesday at about 11:00?" And then they go, "Oh, gee. I must have forgotten that part."

So, in the case of the police officer, he knows at the beginning that you saw his squad car parked at the 7-11 in West Sacramento, so it changes the texture of the investigation. And it is an additional burden.

MR. BELTRAMI: Don't you do joint work with West Sacramento?

MS. CONTRERAS: How do you think that we know that they're there? Call the city manager's office, report to the 7-11.

MS. GOMES: I have a question about that, when you say that that creates a higher burden by them knowing what's going to be happening during the investigation.

Could you explain how did that create a higher burden?

MS. CONTRERAS: Well, in many cases, it can change the way you handle an investigation, and it can impact the amount of information you have to have before you get there. Typically, we get a complaint. We interview whoever the complainant is and any witnesses they may identify, and then you basically talk to the employee and confront them with information that you've received in most cases; but it changes the nature of the questioning that you have to do and the amount of information you have to have ahead of time in order to be absolutely certain of what your facts are, because the employee is going to know where you're going before you get into the interview.

He reads the blue sheet, talks to his attorney and comes in with a defense, so you have to have a substantially greater amount of information in order to get to where you need to be. Most investigations are not as easy as, "Where were you at 11:00 o'clock yesterday?" They tend to be complex, and many of them relate to things like tactics.

So knowing ahead of time where we're going means we have to have a lot more information in order to get an

effective case investigation and obtain a result that gives us, what we believe, to be the reality of the situation.

CHAIRPERSON PORINI: All right. Thank you.

Mr. Beltrami.

MR. BELTRAMI: Camille, why did we break it down by the type of entity, why do we have something for county, something for school districts?

MS. SHELTON: The reason I did that --

MR. BELTRAMI: Yes.

MS. SHELTON: -- was because POBOR does apply to peace officers employed by local agencies and school districts. Unfortunately, in this situation, there were prior statutory schemes related to adverse comments that were different for school districts and county and special districts and cities, and so that's why I broke that down, because the prior law was different for each type of entity, which made it very confusing.

CHAIRPERSON PORINI: All right. Other questions or comments?

MR. BURDICK: If I can just make one comment, and that is: I think this has been helpful, the discussion today. And one of the things we talked about is that if you agree with staff recommendation, and hopefully with the amendments that are recommended by local government, or with or without them, we think that the step next is obviously Parameters and Guidelines, to sit down and kind of negotiate and discuss these things, where we're going to, for the first time, really have an opportunity to sit down with both sides,

state agencies, as well, and with Camille, to go through these things and sort them out.

I think that some of these issues that now are unclear can be clarified at that point and then staff can probably come back and hopefully we can all reach an agreement, but, if there aren't, we could probably narrow them down to fewer items and be a little more specific.

As you can see, it's an extremely complex issue but that's one of the problems, sometimes, as we go into there, this process becomes a little bit adversarial in the sense of people sending documents back and forth. We did have an opportunity to sit down, and we did request an initial meeting, but, unfortunately, until after the hearing, it seems like, very often, sometimes the state agency people feel a little reserved, at least it's my perception they feel a little reserved, about what they might want to comment on, in the sense that they may say something -- that they may agree to something that is mandated that maybe they shouldn't have agreed to, or whatever. I would hope that, as we move along, that if there are areas that you're not clear, that you just leave those on the table to be dealt with at the Parameter and Guideline process.

MS. SHELTON: Can I comment on that?

CHAIRPERSON PORINI: Please.

MS. SHELTON: I agree that the activities described in the Parameters and Guidelines are going to be far more detailed than what is provided in the staff analysis, but the activities that are listed in the staff analysis are required

to be analyzed by the Commission to first determine if there's a reimbursable state-mandated activity.

The issue, with regard to written reprimands, you need to make a finding on that today to determine whether or not that's going to be included as a reimbursable state-mandated activity. I don't think you can leave that to the Parameter and Guideline stage.

What you can leave to the Parameter and Guideline stage would be how much activity do you want to give them to determine whether or not a transfer is punitive? I mean, those types of questions can come at the Parameter and Guideline stage, but this language in here is directly from the statute. I would not recommend leaving these issues for the Parameter and Guideline stage.

CHAIRPERSON PORINI: All right.

MS. SHELTON: But the scope and the extent, those types of issues may be left to the Parameter and Guideline stage.

MR. BURDICK: Just a comment. I think there's a question of what is proper to do. I think you can do -- leave them if you want. You have the discretion to do that. I don't think that -- and I'd like to clarify. I don't think Camille is saying you can't do it; I think she's saying you probably shouldn't do it, or staff wouldn't recommend it.

But, I guess, that is also an issue where we've dealt with -- or we haven't had a lot of clarity on, and this might be a good time to get some clarity, although maybe not with two brand new members today, although Michael has been

here once before, but that, I think, is an important issue, whether or not things of that nature can, because they are going to come back to you in the Parameter and Guideline process.

CHAIRPERSON PORINI: Camille.

MS. SHELTON: Let me just mention the fact that these activities listed in here are critical to determine whether a new program or higher level of service exists and whether there are costs mandated by the state. Those are test claim issues not Parameters and Guidelines issues.

CHAIRPERSON PORINI: Ms. Steinmeier.

MS. STEINMEIER: I would like to move the staff analysis with the addition of the activities of providing tape recordings of interrogations. That isn't -- there is something about a tape recording here, but producing the transcripts sometimes with a tape recording, and that isn't in the staff analysis or the staff recommendation, so, with that addition, I would like to move it.

MR. BELTRAMI: Second.

CHAIRPERSON PORINI: All right. We have a motion and a second.

May we have role call?

MS. HIGASHI: Mr. Beltrami.

MR. BELTRAMI: Yes.

MS. HIGASHI: Ms. Gomes.

MS. GOMES: Yes.

MS. HIGASHI: Mr. Foulkes.

MR. FOULKES: Yes.

MS. HIGASHI: Mr. Van Houten.

MR. VAN HOUTEN: Yes.

MS. HIGASHI: Ms. Steinmeier.

MS. STEINMEIER: Aye.

MS. HIGASHI: Chairperson Porini.

CHAIRPERSON PORINI: Yeah. NO

All right. Thank you very much.

MS. STEINMEIER: And thanks, also, to the staff for the phenomenal effort that's gone into this staff analysis.

CHAIRPERSON PORINI: Just for the record, Mr. Burdick, so that Mr. Van Houten won't feel left out, he has joined us on numerous occasions when Mr. Sherwood has not.

MR. BURDICK: I apologize.

MR. BELTRAMI: Madam Chairman, may I just tell Ms. Contreras that everything that comes to courts are arcane.

MS. CONTRERAS: Thank you very much.

CHAIRPERSON PORINI: Okay.

MS. HIGASHI: Next is the Mandate Reimbursement Process. This item will be presented by Piper Rodrian of our staff. And I'd like to commend her. She's our staff person responsible for our consent calendar items.

MS. RODRIAN: Good morning.

These Parameters and Guidelines allow claimants to seek reimbursement for costs incurred during the mandate process. The original Parameters and Guidelines were adopted in 1986. Since 1995, staff has updated them annually to

REPORTER'S CERTIFICATE

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STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I hereby certify the foregoing hearing was held at the time and place therein named; that the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting.

IN WITNESS WHEREOF, I have hereunto set my hand this 6th day of September, 1999.

STACEY L. HEFFERNAN, CSR, RPR
NO. 10750

Hearing Date: August 26, 1999
File Number: CSM 4499
mandates\\4499\\finalto.doc

Item # 2

Staff Analysis

Government Code Sections 3300 through 3310

As Added and Amended by Statutes of 1976, Chapter 465;
Statutes of 1978, Chapters 775, 1173, 1174, and 1178;
Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994;
Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and
Statutes of 1990, Chapter 675

Peace Officers Procedural Bill of Rights

Executive Summary

Introduction

In order to ensure stable employer-employee relations and effective law enforcement services, the Legislature enacted the Peace Officers Procedural Bill of Rights (POBOR).

The test claim legislation provides procedural protections to peace officers employed by local agencies and school districts when a peace officer is subject to an interrogation by the employer, is facing punitive action or receives an adverse comment in his or her personnel file. The protections required by the test claim legislation apply to peace officers classified as permanent employees, peace officers who serve at the pleasure of the agency, and peace officers on probation who have not reached permanent status.

Claimant's Position

The claimant, the City of Sacramento, contends that the test claim legislation constitutes a reimbursable state mandated program. The claimant acknowledges that due process principles apply to this claim. However, the claimant asserts that the requirements imposed by the test claim legislation are broader than those imposed by the due process clause. The claimant states that "[t]he basic intent of the City's test claim is to seek reimbursement of costs associated with activities specifically afforded peace officers that go beyond what the court has set as minimum requirements for public employees."

State Agency Comments

The Department of Finance contends that the test claim legislation does not constitute a reimbursable state mandated program because the due process principles set forth in *Skelly* v. *State Personnel Board*[1], which predate the enactment of the test claim legislation, require local agencies to perform the same activities.

The State Personnel Board contends that the procedural protections accorded a peace officer by the test claim legislation all further important due process values. The State Personnel Board

75) 15 Cal.3d 194 (Exhibit A, Bates page 0149).

states that "[g]iven that a recognized value in federal due process is, to a great extent, to promote accuracy in its decision-making, one can assume that a governmental entity implementing POBOR will achieve a greater accuracy in its decision-making in the personnel arena" and less retaliatory litigation. Thus, the State Personnel Board asserts that the cost savings resulting from the test claim legislation should more than offset any costs that might be attributable solely to the test claim legislation.

Staff Analysis

Several courts have recognized a connection between the test claim legislation and the due process clause of the United States and California Constitutions. The due process clause, like the test claim legislation, affords notice and hearing protections to permanent employees when the employee is subject to a dismissal, demotion, suspension, reduction in salary or written reprimand. The due process clause also affords procedural protections to probationary and at-will employees when the employee's reputation and ability to obtain future employment is harmed by a dismissal.

Under these circumstances, the due process clause requires public employers to provide the employee with notice of the proposed action, reasons for the action, a copy of the charges and materials upon which the action is based and the right to respond, either orally or in writing, to the authority initially imposing the disciplinary action.

The test claim legislation imposes some of the same due process notice and hearing protections to peace officers. This connection between the due process clause and the test claim legislation is relevant to the analysis of this claim in two respects. First, the due process clause of the United States and California Constitutions were in effect before the enactment of the test claim legislation. Thus, the Commission must determine whether the test claim legislation imposes a new program or higher level of service on local agencies and school districts.

Second, the due process clause of the United States Constitution is a form of federal law. Pursuant to Government Code section 17556, subdivision (c), there are *no* "costs mandated by the state" if the test claim legislation "implemented a federal law resulting in costs mandated by the federal government, unless the [test claim legislation] mandates costs which exceed the mandate in that federal law or regulation." Thus, the Commission must also determine if the test claim legislation results in "costs mandated by the state."

Issues Raised After Issuance of Draft Staff Analysis

On July 6, 1999, the Draft Staff Analysis was issued. The claimant and the Department of Finance in conjunction with the State Personnel Board filed comments to the Draft Staff Analysis, copies of which are included in the agenda binders as Exhibits K and L.

The claimant contends the following:

- That written reprimands are not protected by the due process clause and, thus, the test claim requirements pertaining to written reprimands are new and constitute a new program or higher level of service.
- That the activity of providing the peace officer with the tape recording of the interrogation is required by section 3303, subdivision (g), and, thus, constitutes a reimbursable state mandated activity.

The Department of Finance and the State Personnel Board contend the following:

- That Government Code section 3304, subdivision (b), which describes the right to an administrative appeal, does not apply to probationary and at-will employees.
- That the due process clause applies when a permanent employee is transferred for purposes of punishment and, thus, the test claim requirements pertaining to transfers are not new and do not impose a new program or higher level of service.
- That "*State civil service* probationary or at-will employees are entitled to *Skelly* rights by the State Personnel Board" to the charging documents and reports and, thus, Government Code section 3303, subdivision (g), does not constitute a reimbursable state mandated program with respect to these employees.

For the reasons stated in the Staff Analysis, staff disagrees with all of these contentions and has not modified the recommendation in the Draft Staff Analysis. (See pages A-11, A-12, A-16, A-19, A-20, A-22.)

Conclusion and Staff Recommendation

Based on a comparison of the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation, staff concludes that the test claim legislation constitutes a partial reimbursable state mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following reimbursable activities:

1. Providing the opportunity for an administrative appeal for the following disciplinary actions (Gov. Code, § 3304, subd. (b)):
   - Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest are *not* affected (i.e.; the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
   - Transfer of permanent, probationary and at-will employees for purposes of punishment;
   - Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
   - Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.
2. Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
3. Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)
4. Producing transcribed copies of any notes made by a stenographer at an interrogation, and reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer in the following circumstances (Gov. Code, § 3303, subd. (g)):
   (a) When the investigation *does not* result in disciplinary action; and

(b) When the investigation results in:

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
- A transfer of a permanent, probationary or at-will employee for purposes of punishment;
- A denial of promotion for a permanent, probationary or at-will employee for reasons other than merit; or
- Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career of the employee.

5. Performing the following activities upon receipt of an adverse comment (Gov. Code, §§ 3305 and 3306):

School Districts

(a) If the adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then schools are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If the adverse comment *is* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If the adverse comment *is not* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Counties

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then counties are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If the adverse comment *is* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If the adverse comment *is not* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Cities and Special Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then cities and special districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If the adverse comment *is* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;

- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If the adverse comment *is not* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Staff Recommendation

Staff recommends that the Commission approve this test claim accordingly.

Claimant

ity of Sacramento

Chronology

12/21/95	Claimant files test claim with the Commission
01/26/96	Staff notifies claimant that the test claim is incomplete
03/08/96	Claimant files letter providing statutory code sections included in the test claim
04/26/96	Staff notifies claimant that the test claim is complete
07/17/96	Response filed by the Department of Finance
11/19/96	Staff issues letter to claimant requesting status of claimant's rebuttal.
12/06/96	Claimant files rebuttal
12/20/96	Claimant requests continuance of hearing
12/23/96	Staff issues letter to parties regarding revised schedule
01/27/97	Informal conference
01/31/97	Staff issues letter to parties regarding revised schedule
08/06/97	Staff issues letter to claimant requesting status of additional requested information
09/05/97	Claimant files supplemental information
19/98	Staff issues letter to parties requesting supplemental briefing on due process issues
06/17/98	Claimant files supplemental comments in response to staff request of March 19, 1998
06/17/98	State Personnel Board files comments in response to staff request of March 19, 1998
07/06/99	Draft Staff Analysis issued
08/06/99	Claimant files comments on Draft Staff Analysis
08/12/99	Department of Finance and State Personnel Board file comments on Draft Staff Analysis

Test Claim Legislation

In 1976, the Legislature enacted Government Code sections 3300 through 3310, known as the Peace Officers Procedural Bill of Rights Act. The test claim legislation provides a series of rights and procedural safeguards to peace officers employed by local agencies and school districts that are subject to investigation or discipline. Legislative intent is expressly provided in Government Code section 3301 as follows:

> "The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law

enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, within the State of California."

The test claim legislation applies to all employees classified as "peace officers" under specified provisions of the Penal Code, including those peace officers employed by counties, cities, special districts and school districts.[2] The test claim legislation also applies to peace officers that are classified as permanent employees, peace officers who serve at the pleasure of the agency and are terminable without cause ("at-will" employees)[3] and peace officers on probation who have not reached permanent status.[4]

STAFF ANALYSIS

Issue: Does the test claim legislation, which establishes rights and procedures for peace officers subject to investigation or discipline, constitute a reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514[5]?

For a statute to impose a reimbursable state mandated program, the statutory language must direct or obligate an activity or task upon local governmental agencies. In addition, the required activity or task must be new, thus constituting a "new program", or create an increased or "higher level of service" over the former required level of service. The court has defined a "new program" or "higher level of service" as a program that carries out the governmental function of providing services to the public, or a law which, to implement a state policy, imposes unique requirements on local agencies and does not apply generally to all residents and entities in the state. To determine if a required activity is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately prior to the enactment of the test claim legislation.

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[2] Government Code section 3301 states: "For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code."

[3] *Gray* v. *City of Gustine* (1990) 224 Cal.App.3d 621 (Exhibit A, Bates page 0213); *Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795 (Exhibit A, Bates page 0193).

[4] *Bell* v. *Duffy* (1980) 111 Cal.App.3d 643 (Exhibit A, Bates page 0187); *Barnes* v. *Personnel Department of the City of El Cajon* (1978) 87 Cal.App.3d 502 (Exhibit A, Bates page 0183).

[5] Government Code section 17514 defines "costs mandated by the state" as follows: "'Costs mandated by the state' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

Finally, the newly required activity or increased level of service must be state mandated and impose "costs mandated by the state."[6]

The test claim legislation requires local agencies and school districts to take specified procedural steps when investigating or disciplining a peace officer employee. The stated purpose of the test claim legislation is to promote stable relations between peace officers and their employers and to ensure the effectiveness of law enforcement services. Based on the legislative intent, staff finds that the test claim legislation carries out the governmental function of providing a service to the public. Moreover, the test claim legislation imposes unique requirements on local agencies and school districts that do not apply generally to all residents and entities of the state. Thus, the test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.

Several California courts have analyzed the test claim legislation, however, and found a connection between its requirements and the requirements imposed by the due process clause of the United States and California Constitutions. For example, the court in *Riveros* v. *City of Los Angeles* analyzed the right to an administrative appeal under the test claim legislation for a probationary employee and noted that the right to such a hearing arises from the due process clause.

> "*The right to such a hearing arises from the due process protections of the Fourteenth Amendment to the United States Constitution.* . . . .The limited purpose of the section 3304 appeal is to give the peace officer a chance to establish a formal record of the circumstances surrounding his termination and try to convince his employer to reverse its decision, either by showing that the charges are false or through proof of mitigating circumstances [citation omitted]. *This is very nearly the same purpose for the hearing mandated by due process requirements*, which must afford the officer a chance to refute the charges or clear his name." (Emphasis added.)[7]

Thus, the Commission must continue its inquiry and compare the test claim legislation to the prior legal requirements imposed on public employers by the due process clause to determine if the activities defined in the test claim legislation are new or impose a higher level of service.

Furthermore, the Commission must determine whether there are any "costs mandated by the state." Since the due process clause of the United States Constitution is a form of federal law, Government Code section 17556, subdivision (c), is triggered. Pursuant to Government Code section 17556, subdivision (c), there are *no* "costs mandated by the state" and no reimbursement is required if the test claim legislation "implemented a federal law resulting in costs mandated by

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[6] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *City of Sacramento* v. *State of California* (1990) 50 Cal.3d 51, 66; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835; Gov. Code, § 17514.

[7] *Riveros* v. *City of Los Angeles* (1996) 41 Cal.App.4th 1342, 1359 (Exhibit A, Bates page 0279).

the federal government, unless the [test claim legislation] mandates costs which exceed the mandate in that federal law or regulation."[8]

These issues are discussed below.

The Due Process Clause of the U.S. and California Constitutions

The due process clause of the United States and California Constitutions provide that the state shall not "deprive any person of life, liberty, or property without due process of law."[9] In the public employment arena, an employee's property and liberty interests are commonly at stake.

Property Interest in Employment

Property interests protected by the due process clause extend beyond actual ownership of real estate or money. The U.S. Supreme Court determined that a property interest deserving protection of the due process clause exists when an employee has a "legitimate claim" to continued employment.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . ."
>
> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - -rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[10]

Applying the above principles, both the U.S. Supreme Court and California courts hold that "permanent" employees, who can only be dismissed or subjected to other disciplinary measures for "cause", have a legitimate claim of entitlement to their job and thus, possess a property interest in continued employment.[11]

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[8] Government Code section 17513 defines "costs mandated by the federal government" as follows:

> " 'Costs mandated by the federal government' means any increased costs incurred by a local agency or school district after January 1, 1973, in order to comply with the requirements of a federal statute or regulation. 'Costs mandated by the federal government' includes costs resulting from enactment of state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state. 'Costs mandated by the federal government' does not include costs which are specifically reimbursed or funded by the federal or state government or programs or services which may be implemented at the option of the state, local agency, or school district."

[9] U.S. Constitution, 14th Amendment; California Constitution, Article 1, §§ 7 and 15.

[10] *Board of Regents* v. *Roth* (1972) 408 U.S. 564, 577 (Exhibit A, Bates page 0045).

[11] *Slochower* v. *Board of Education* (1956) 350 U.S. 551 (Exhibit A, Bates page 0101), where the U.S. Supreme Court found that a tenured college professor dismissed from employment had a property interest in continued employment that was safeguarded by the due process clause; *Gilbert* v. *Homar* (1997) 520 U.S. 924 (Exhibit A, Bates page 0071), where the U.S. Supreme Court found that a police officer, employed as a permanent employee by a state university, had a property interest in continued employment and was afforded due process protections resulting from a suspension without pay; *Skelly* v. *State Personnel Board* (1975) 15 Cal.3d 194 (Exhibit A, Bates

Moreover, California courts require employers to comply with due process when a permanent employee is dismissed[12], demoted[13], suspended[14], receives a reduction in salary[15] or receives a written reprimand.[16]

The Department of Finance and the State Personnel Board contend that due process property rights attach when an employee is transferred. They cite *Runyon* v. *Ellis* and an SPB Decision (*Ramallo* SPB Dec. No. 95-19) for support.[17]

Staff disagrees with the State's argument in this regard. First, in *Runyon* v. *Ellis*, the court found that the employee was entitled to an administrative hearing under the due process clause as a result of a transfer *and an accompanying reduction of pay*. The court did not address the situation where the employee receives a transfer alone.[18] In addition, in *Howell* v. *County of San Bernardino*, the court recognized that "[a]lthough a permanent employee's right to continued employment is generally regarded as fundamental and vested, an employee enjoys no such right to continuation in a particular job assignment."[19] Thus, staff finds that local government employers are not required to provide due process protection in the case of a transfer.

Furthermore, although the SPB decision may apply to the State as an employer, there is no indication, or support for the proposition that the SPB decision applies to actions taken by a local government employer.

Accordingly, staff finds that an employee does *not* enjoy the rights prescribed by the due process clause when the employee is transferred.

When a property interest is affected and due process applies, the procedural safeguards required by the due process clause generally require notice to the employee and an opportunity to respond, with some variation as to the nature and timing of the procedural safeguards. In cases of dismissal, demotion, long-term suspension and reduction of pay, the California Supreme Court in *Skelly* prescribed the following due process requirements *before* the discipline becomes effective:

- Notice of the proposed action;
- The reasons for the action;
- A copy of the charges and materials upon which the action is based; and

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page 0149), where the California Supreme Court held a permanent civil service employee of the state has a property interest in continued employment and cannot be dismissed without due process of law.

[12] *Skelly, supra*, 15 Cal.3d 194.

[13] *Ng.* v. *State Personnel Board* (1977) 68 Cal.App.3d 600 (Exhibit A, Bates page 0269).

[14] *Civil Service Assn.* v. *City and County of San Francisco* (1978) 22 Cal.3d 552, 558-560 (Exhibit A, Bates page 0123).

[15] *Ng, supra,* 68 Cal.App.3d 600, 605.

[16] *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438 (Exhibit A, Bates page 0309).

[17] Exhibit L, Comments to Draft Staff Analysis.

[18] *Runyon* v. *Ellis* (1995) 40 Cal.App.4th 961 (Exhibit A, Bates page 0293).

[19] *Howell* v. *County of San Bernardino* (1983) 149 Cal.App.3d 200, 205 (Exhibit A, Bates page 0243).

- The right to respond, either orally or in writing, to the authority initially imposing discipline.[20]

In cases of short-term suspensions (ten days or less), the employee's property interest is protected as long as the employee receives notice, reasons for the action, a copy of the charges, and the right to respond *either during the suspension, or within a reasonable time thereafter.*[21]

Similarly, staff finds that in the case of a written reprimand where the employee is not deprived of pay or benefits, the employer is not required to provide the employee with the due process safeguards *before* the effective date of the written reprimand. Instead, the court in *Stanton* found that an appeals process provided to the employee *after* the issuance of the written reprimand satisfies the due process clause.[22]

The claimant disagrees with staff's interpretation of the *Stanton* case (Exhibit A, Bates page 309) and its application to written reprimands.

The claimant contends *Stanton* stands for the proposition that the due process guarantees outlined in *Skelly* do not apply to a written reprimand. Thus, the claimant concludes that an employee is not entitled to any due process protection when the employee receives a written reprimand. The claimant cites the following language from *Stanton* (Bates page 311) in support of its position:

> ". . . As the City notes, no authority supports plaintiff's underlying assertion that issuance of a written reprimand triggers the due process safeguards outlined in *Skelly*. Courts have required adherence to *Skelly* in cases in which an employee is demoted [citations omitted]; suspended without pay [citations omitted]; or dismissed [citations omitted]. We find no authority mandating adherence to *Skelly* when a written reprimand is issued."
>
> "We see no justification for extending *Skelly* to situations involving written reprimands. Demotions, suspension and dismissal all involve depriving the public employee of pay or benefits; a written reprimand results in no such loss to the employee."

The facts in *Stanton* are as follows. A police officer received a written reprimand for discharging a weapon in violation of departmental rules. After he received the reprimand, he appealed to the police chief in accordance with the memorandum of understanding and the police chief upheld the reprimand. The officer then filed a lawsuit contending that he was entitled to an administrative appeal. The court denied the plaintiff's request finding that that the meeting with the police chief satisfied the administrative appeals provision in the test claim legislation (Government Code section 3304), and thus, satisfied the employee's due process rights.

Staff agrees that the court in *Stanton* held the rights outlined in *Skelly* do not apply when an employee receives a written reprimand. Thus, under *Skelly*, the rights to receive notice, the reasons for the reprimand, a copy of the charges and the right to respond are not required to be given to an employee *before* the reprimand takes effect.

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[20] *Skelly, supra*, 15 Cal.3d 194, 215.

[21] *Civil Service Assn., supra*, 22 Cal.3d 552, 564.

[22] *Stanton, supra* ,226 Cal.App.3d 1438, 1442 (Exhibit A, Bates page 0309. 0311).

However, the court found that the employee *is* guaranteed due process protection upon receipt of written reprimand. The court found that when the appeals process takes places *after* the reprimand, due process is satisfied. The court in *Stanton* also states the following:

> "Moreover, Government Code section 3303 et seq., the Public Safety Officer Procedural Bill of Rights Act, provides police officers who are disciplined by their departments with procedural safeguards. Section 3304, subdivision (b) states no punitive action may be taken by a public agency against a public safety officer without providing the officer with an opportunity for administrative appeal. Punitive action includes written reprimands. [Citation omitted.] Even without the protection afforded by Skelly, plaintiff's *procedural due process rights*, following a written reprimand, ***are protected*** by the appeals process mandated by Government Code section 3304, subdivision (b)." (Emphasis added.)[23]

Accordingly, staff finds that the due process clause of the United States and California Constitutions apply when a permanent employee is

- Dismissed;
- Demoted;
- Suspended;
- Receives a reduction in salary; and
- Receives a written reprimand.

erty Interest

Although probationary and at-will employees, who can be dismissed without cause, do not have a property interest in their employment, the employee may have a liberty interest affected by a dismissal when the charges supporting the dismissal damage the employee's reputation and impair the employee's ability to find other employment. The courts have defined the liberty interest as follows:

> "[A]n employee's liberty is impaired if the government, in connection with an employee's dismissal or failure to be rehired, makes a 'charge against him that might seriously damage his standing and associations in the community,' such as a charge of dishonesty or immorality, or would 'impose on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.' [Citations omitted.] A person's protected liberty interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. [Citations omitted.] Rather, the liberty interest is infringed only when the defamation is made in connection with the loss of a government benefit, such as,...employment. [Citations omitted.]" [24]

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[23] *Stanton, supra*, 226 Cal.App.3d 1438, 1442 (Exhibit A, Bates page 0309. 0311).

[24] *Harden v. County of Sacramento* (1984) 160 Cal.App.3d 302, 308 (Exhibit A, Bates page 0261), quoting from *Board of Regents v. Roth, supra*, 408 U.S. at p. 573. See also *Paul v. Davis* (1976) 424 U.S. 693, 711-712

For example, in *Murden* v. *County of Sacramento*, the court found a protected liberty interest when a *temporary* deputy sheriff was dismissed from employment based on charges that he was engaging two female employees in embarrassing and inappropriate conversation regarding sexual activities. The court noted that the charge impugned the employee's character and morality, and if circulated, would damage his reputation and impair his ability to find other employment.

The court in *Murden* clarified that a dismissal based on charges that the employee was unable to learn the basic duties of the job does *not* constitute a protected interest.[25]

When the employer infringes on a person's liberty interest, due process simply requires notice to the employee, and an opportunity to refute the charges and clear his or her name. Moreover, the "name-clearing" hearing can take place *after* the actual dismissal.[26]

Accordingly, staff finds that the due process clauses of the United States and California Constitutions apply when the charges supporting the dismissal of a probationary or at-will employee damage the employee's reputation and impair the employee's ability to find other employment.

Test Claim Legislation

As indicated above, employers are required by the due process clause to offer notice and hearing protections to *permanent* employees for dismissals, demotions, suspensions, reductions in salary and written reprimands.

Employers are also required by the due process clause to offer notice and hearing protections to *probationary* and *at-will* employees when the dismissal harms the employee's reputation and ability to obtain future employment.

As more fully discussed below, the test claim legislation imposes some of the *same* notice and hearing requirements imposed under the due process clause.

Administrative Appeal

Government Code section 3304, as added by the test claim legislation, provides that "no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."[27]

(Exhibit A, Bates page 0079); and *Lubey* v. *City and County of San Francisco* (1979) 98 Cal.App.3d 340 (Exhibit A, Bates page 0249).

[25] *Murden, supra.* 160 Cal.App.3d 302, 308 (Exhibit A, Bates page 0261)

[26] *Murden, supra*, 160 Cal.App.3d 302, 310 (Exhibit A, Bates page 0261); *Arnett* v. *Kennedy* (1974) 416 U.S. 134, 157 (Exhibit A, Bates page 0001); and *Codd* v. *Velger* (1977) 429 U.S. 624, 627 (Exhibit A, Bates page 0061).

[27] In the Claimant's comments to the Draft Staff Analysis (Exhibit K), the claimant recites Government Code section 3304, *as amended in 1997 (Stats. 1997, c. 148) and 1998 (Stats. 1998, c. 786)*. These amendments made substantive changes to Government Code section 3304 by adding subdivisions (c) through (g). These changes include a statute of limitations concerning how long the agency can use acts as a basis for discipline, a provision prohibiting the removal of a chief of police without providing written notice describing the reasons for the removal and an administrative hearing, and a provision limiting the right to an administrative appeal to officers who successfully complete the probationary period. *Neither the 1997 nor 1998 statutes are alleged in this test claim.*

Punitive action is defined in Government Code section 3303 as follows:

> "For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary[28], written reprimand, or transfer for purposes of punishment."

The California Supreme Court determined that the phrase "for purposes of punishment" in the foregoing section relates only to a transfer and not to other personnel actions.[29] Thus, in transfer cases, the peace officer is required to prove that the transfer was intended for purposes of punishment in order to be entitled to an administrative appeal. If the transfer is to "compensate for a deficiency in performance," however, an appeal is not required.[30, 31]

In addition, at least one California appellate court determined that employers must extend the right to an administrative appeal under the test claim legislation to peace officers for other actions taken by the employer that result in "disadvantage, harm, loss or hardship" and impact the peace officer's career.[32] In *Hopson*, the court found that an officer who received a report in his personnel file by the police chief regarding a shooting in violation of policies and procedures was entitled to an administrative appeal under Government Code section 3304. The court held that the report constituted "punitive action" under the test claim legislation based on the source of the report, its contents, and its potential impact on the career of the officer.[33]

Finally, the test claim legislation does not specifically set forth the hearing procedures required for the administrative appeal. Rather, the type of administrative appeal is left up to the discretion of each local agency and school district.[34] The courts have determined, however, that the type of hearing required under Government Code section 3304 must comport with standards of fair play and due process.[35, 36]

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[28] The courts have held that "reduction in salary" includes loss of skill pay (*McManigal* v. *City of Seal Beach* (1985) 166 Cal.App.3d 975, Exhibit A, Bates page 0255)), pay grade (*Baggett* v. *Gates* (1982) 32 Cal.3d 128, Exhibit A, Bates page 0111)), rank (*White* v. *County of Sacramento* (1982) 31 Cal.3d 676, Exhibit A, Bates page 0165)), and probationary rank (*Henneberque* v. *City of Culver City* (1983) 147 Cal.App.3d 250, Exhibit A, Bates page 0221)).

[29] *White* v. *County of Sacramento* (1982) 31 Cal.3d 676 (Exhibit A, Bates page 0165).

[30] *Holcomb* v. *City of Los Angeles* (1989) 210 Cal.App.3d 1560 (Exhibit A, Bates page 0231); *Heyenga* v. *City of San Diego* (1979) 94 Cal.App.3d 756 (Exhibit A, Bates page 0225); *Orange County Employees Assn., Inc.* v. *County of Orange* (1988) 205 Cal.App.3d 1289 (Exhibit A, Bates page 0275).

[31] The claimant wants the Commission to keep in mind when finding a mandate, or at the parameters and guidelines phase, that what constitutes a transfer for purposes of punishment is in the eyes of the employee. The claimant states that in the field if labor relations, peace officers will often request a full POBOR hearing and procedure on a transfer which is not acceptable to the officer in question, even though the transfer is not accompanied by a reduction in pay or benefits and no disciplinary action has been taken. (Exhibit K, Claimant's comments to Draft Staff Analysis.)

[32] *Hopson* v. *City of Los Angeles* (1983) 139 Cal.App.3d 347, 354 (Exhibit A, Bates page 0237), relying on *White* v. *County of Sacramento* (1982) 31 Cal.3d 676, 683.

[33] *Id* at p. 353-354.

[34] *Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795, 1806 (Exhibit A, Bates page 0193); *Runyan, supra*, 40 Cal.App.4th 961, 965 (Exhibit A, Bates page 0293).

[35] *Doyle* v. *City of Chino* (1981) 117 Cal.App.3d 673, 684 (Exhibit A, Bates page 0205). In addition, the court in *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1442 (Exhibit A, Bates page 0309), held that the loyee's due process rights were protected by the administrative appeals process mandated by Government Code

The Department of Finance and the State Personnel Board contend that Government Code section 3304 does not require an administrative appeal for probationary and at-will employees. They cite Government Code section 3304, subdivision (b), as it is *currently* drafted, which provides the following: "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer *who has successfully completed the probationary period that may be required by his or her employing agency* without providing the public safety officer with an opportunity for administrative appeal."[37]

However, the italicized language in section 3304, subdivision (b), was added by the Legislature in 1998 and became effective on January 1, 1999. (Stats. 1998, c. 768). When Government Code section 3304, subdivision (b), was originally enacted in 1976, it did not limit the right to an administrative appeal to permanent employees only. Rather, that section stated the following:

> "(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

Accordingly, staff finds that an administrative appeal under Government Code section 3304, subdivision (b), was required to be provided to probationary and at-will employees faced with punitive action or a denial of promotion until December 31, 1998.

The Department of Finance also contends that the cost of conducting an administrative hearing is already required under the due process clause and the *Skelly* case, which predate the test claim legislation.

Staff agrees that in some circumstances, the due process clause requires the same administrative hearing as the test claim legislation. However, as reflected by the table below, the test claim legislation is broader than the due process clause and applies to additional employer actions that have not previously enjoyed the protections of the due process clause.

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section 3304. Furthermore, in cases involving "misconduct", the officer is entitled to a liberty interest name-clearing hearing under Government section 3304. *(Lubey* v. *City and County of San Francisco* (1979) 98 Cal.App.3d 340, Exhibit A, Bates page 0249; *Murden, supra,* Exhibit A, Bates page 0261.)

[36] Staff notes that at least two cases have referred to the need for an administrative appeals procedure that would enable the officer to obtain court review pursuant to Code of Civil Procedure section 1094.5. Such a review implies that an evidentiary hearing be held from which a record and findings may be prepared for review by the court. (*Doyle, supra,* 117 Cal.App. 3d 673; *Henneberque, supra,* 147 Cal.App.3d 250.) In addition, the California Supreme Court uses the words "administrative appeal" of section 3304 interchangeably with the word "hearing." (*White, supra,* 31 Cal.3d 676.)

[37] Exhibit L, Comments to Draft Staff Analysis.

Due Process	Test Claim Legislation
Dismissal of a permanent employee	Dismissal of permanent, *probationary* or *at-will employees*
Demotion of a permanent employee	Demotion of permanent, *probationary* or *at-will employees*
Suspension of a permanent employee	Suspension of permanent, *probationary* or *at-will employees*
Reduction in salary for a permanent employee	Reduction in salary for permanent, *probationary* or *at-will employees*
Written reprimand of a permanent employee	Written reprimand of permanent, *probationary* or *at-will employees*
Dismissal of a probationary or at-will employee which harms the employee's reputation and ability to find future employment	Dismissal of a probationary or at-will employee which harms the employee's reputation and ability to find future employment
	Transfer of a permanent, probationary or at-will employee for purposes of punishment
	Denial of promotion for permanent, probationary or at-will employees on grounds other than merit
	Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee

Thus, staff finds that the administrative appeal would be required in the absence of the test claim legislation when:

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal.

Under these circumstances, the administrative appeal *does not* constitute a new program or higher level of service because prior law requires such an appeal under the due process clause. Moreover, pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing the administrative appeal in the above circumstances would not constitute "costs mandated by the state" since the administrative appeal merely implements the requirements of the United States Constitution.

Staff finds, however, that the due process clauses of the United States and California Constitutions do not require an administrative appeal in the following circumstances:

- Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e.; the charges do not harm the employee's reputation or ability to find future employment);
- Transfer of permanent, probationary and at-will employees for purposes of punishment;
- Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and

- Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

Thus, in these situations, staff finds that the administrative appeal required by Government Code section 3304 constitutes a new program or higher level of service and imposes "costs mandated by the state" under Government Code section 17514.

Compensation and Timing of an Interrogation

Government Code section 3303 describes the procedures for the interrogation of a peace officer. The procedures and rights given to peace officers under section 3303 do *not* apply to any interrogation in the normal course of duty, counseling, instruction, or informal verbal admonition by a supervisor. In addition, the requirements do not apply to an investigation concerned solely and directly with alleged criminal activities.[38]

Government Code section 3303, subdivision (a), establishes procedures for the timing and compensation of a peace officer subject to investigation and interrogation by an employer. This section requires that the interrogation be conducted at a reasonable hour, preferably at a time when the peace officer is on duty, or during the "normal waking hours" of the peace officer, unless the seriousness of the investigation requires otherwise. If the interrogation takes place during the off-duty time of the peace officer, the peace officer "shall" be compensated for the off-duty time in accordance with regular department procedures.

The claimant contends that Government Code section 3303, subdivision (a), results in the payment of overtime to the investigated employee and, thus, imposes reimbursable state mandated activities. The claimant states the following:

> "If a typical police department works in three shifts, such as the Police Department for this City, two-thirds of the police force work hours [that are] not consistent with the work hours of Investigators in the Internal Affairs section. Even in a smaller department without such a section, hours conflict if command staff assigned to investigate works a shift different than the employees investigated. Payment of overtime occurs to the employees investigated or those performing the required investigation, or is at least a potential risk to an employer for the time an employee is interrogated pursuant to this section."[39]

Staff agrees. Conducting the investigation when the peace officer is on duty, and compensating the peace officer for off-duty time in accordance with regular department procedures are new requirements not previously imposed on local agencies and school districts.

Accordingly, staff finds that Government Code section 3303, subdivision (a), constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution and imposes "costs mandated by the state" under Government Code section 17514.

Notice Prior to Interrogation

Government Code section 3303, subdivisions (b) and (c), require the employer, prior to interrogation, to inform and provide notice of the nature of the investigation and the identity of all officers participating in the interrogation to the employee.

[38] Gov. Code, § 3303, subd. (i).

[39] Claimant filing dated September 5, 1997. (Exhibit F.)

Under due process principles, an employee with a property interest is entitled to notice of the disciplinary action proposed by the employer.[40] Thus, an employee is required to receive notice when the employee receives a dismissal, suspension, demotion, reduction in salary or receipt of a written reprimand. Due process, however, *does not* require notice prior to an investigation or interrogation since the employee has not yet been charged and the employee's salary and employment position have not changed.

Accordingly, staff finds that providing the employee with prior notice regarding the nature of the interrogation and identifying the investigating officers constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution and imposes "costs mandated by the state" under Government Code section 17514.

Tape Recording of Interrogation

Government Code section 3303, subdivision (g), provides, in relevant part:

> "The complete interrogation of a public safety officer *may* be recorded. *If* a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. . . . The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation." (Emphasis added.)

The claimant contends that the activity of providing the peace officer with the tape recording of the interrogation as specified in section 3303, subdivision (g), constitutes a reimbursable state mandated activity. The claimant states the following:

> "As shown above, Government Code, section 3303 (g) allows the interrogation of a peace officer to be tape recorded. The section is silent as to whom may record the interrogation, and who may request that the session be recorded. In practice, the employee will almost always request to record the interrogation. As the employee desires to record same, the employer is faced with the requirement of also tape recording the interrogation in order to assure that the employee's tape is not edited, redacted, or changed in any manner, and to have a verbatim record of the proceedings."[41]

The Department of Finance disagrees contending that the cost of providing recordings of interrogations is required under the due process clause.

For the reasons stated below, staff finds that providing a copy of the recording of the interrogation when further proceedings are contemplated or prior to further interrogation at a subsequent time is *not* a reimbursable state mandated activity.

One of the conditions imposed by the test claim statute requires employers to provide the tape recording to interrogated peace officers if further proceedings are contemplated. If the further proceeding is disciplinary action, then under certain circumstances, due process requires the employer to provide an employee who holds either a property or liberty interest in the job with the materials upon which the disciplinary action is based.

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[40] *Skelly, supra,* 15 Cal.3d 194.

[41] nant's comments to Draft Staff Analysis. (Exhibit K.)

Accordingly, even in the absence of the test claim legislation, the due process clause requires employers to provide such materials, including the tape recording of the interrogation when:

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal[42]; and when
- The disciplinary action is based, in whole or in part, on the interrogation of the employee.

Under these circumstances, the requirement to produce the tape recording of the interrogation under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause.

Moreover, recent court decisions explain that when a local agency performs a permissive act or has alternatives other than performing the action under the test claim statute, the "downstream" or consequential activities, although statutorily required, are *not* state mandated.[43] For example, in *Lucia Mar,* the California Supreme Court found that a newly enacted ten percent payment by a school district was a "new program" when the district sent its disabled pupils to a state school for the severely handicapped. While the ten percent payment was required by the Education Code, the court did *not* find the sum was state mandated and, therefore, reimbursable. The court recognized that school districts may have several options for furnishing special education to its disabled pupils, only one of which is sending them to a state school. Thus, the court remanded to the Commission the question of whether the ten percent payment was state mandated.

Although the claimant contends that a local agency always tape records an interrogation when the employee records the same, the test claim statute does *not* require employers to record the interrogation. Rather, the statute expressly states that the employer "may", at its discretion, record the interrogation. Thus, staff finds that the downstream activity of providing the tape recording to the officer, if the employer chooses to record the interrogation, is also not mandated or required by the test claim statute.[44]

Documents Provided to the Employee

Government Code section 3303, subdivision (g), also provides that the peace officer "shall" be entitled to a transcribed copy of any interrogation notes made by a stenographer or any reports or

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[42] *Skelly, supra*; *Ng, supra*; *Civil Service Assn., supra*; *Stanton, supra;* *Murden, supra.*

[43] *Lucia Mar Unified School Dist.* v. *Honig*, *supra*, 44 Cal.3d 830, 836-837; *County of Los Angeles* v. *Commission on State Mandates* (1995) 32 Cal.App.4th 805, 818.

[44] This analysis is consistent with the Commission's findings in *Nonprofit, Special Use Property Requirements* (CSM – 97-TC-01, decided December 17, 1998). There, the Commission *rejected* the argument that the provisions of former Revenue and Taxation Code section 2207, which required reimbursement for increased costs due to test claim legislation that added new requirements to an existing optional program if the local agency had no reasonable alternative other than to continue the optional program, were subsumed within the present statutory scheme in Government Code section 17500 and following. The Commission found that former Revenue and Taxation Code section 2207 was expressly repealed and replaced with Government Code section 17514, which does *not* require reimbursement for increased costs incurred in an optional program.

complaints made by investigators or other persons, except those that are deemed to be confidential.

The Department of Finance and the SPB contend that the cost of providing copies of transcripts, reports and recordings of interrogations are required under the due process clause and, thus, do not constitute a reimbursable state mandated program.

In *Pasadena Police Officers Association*, the California Supreme Court analyzed Government Code section 3303, noting that it does not specify when an officer is entitled to receive the reports and complaints. The court also recognized that section 3303 does not specifically address an officer's due process entitlement to discovery in the event the officer is *charged* with misconduct.[45] Nevertheless, the court determined that the Legislature intended to require law enforcement agencies to disclose the reports and complaints to an officer under investigation only *after* the officer's interrogation.[46]

The court's decision in *Pasadena Police Officers Association* is consistent with due process principles. Due process requires the employer to provide an employee who holds either a property or liberty interest in the job with a copy of the charges and materials upon which the disciplinary action is based when the officer is charged with misconduct.[47]

Accordingly, even in the absence of the test claim legislation, the due process clause requires the employer to provide a copy of all investigative materials, including non-confidential complaints, reports and charges when, as a result of the interrogation,

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal.

Under these circumstances, the requirement to produce documents under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause. Moreover, pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing the investigative materials in the above circumstances would not constitute "costs mandated by the state" since producing such documentation merely implements the requirements of the United States constitution.

However, staff finds that the due process clause does not require employers to produce the charging documents and reports when requested by the officer in the following circumstances:

(a) When the investigation *does not* result in disciplinary action; and

(b) When the investigation results in:

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);

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[45] *Pasadena Police Officers Assn.* v. *City of Pasadena* (1990) 51 Cal.3d 564, 575 (Exhibit A, Bates page 0135).

[46] *Id.* at 579.

[47] *Upjohn, supra.*

- A transfer of a permanent, probationary or at-will employee for purposes of punishment;
- A denial of promotion for a permanent, probationary or at-will employees for reasons other than merit; or
- Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

The Department of Finance and the State Personnel Board disagree with this conclusion.[48] They contend that "*State civil service* probationary or at-will employees are entitled to [the due process rights prescribed by] *Skelly* . . . . by the State Personnel Board" to the charging documents and reports and, thus, Government Code section 3303, subdivision (g), does not constitute a reimbursable state mandated program with respect to these employees. However, they cite no authority for this proposition.

The Department of Finance and the State Personnel Board also contend that Government Code section 3303, subdivision (g), does not constitute a reimbursable state mandated program when a permanent employee is transferred based on their assertion that a transfer is covered by the due process clause. As noted earlier in the staff analysis, staff disagrees with this contention and finds that a permanent employee does *not* enjoy the rights prescribed by the due process clause when the employee is transferred.

Accordingly, in the circumstances described above, staff finds that producing the documents required by Government Code section 3303, subdivision (g), constitutes a new program or higher level of service and imposes "costs mandated by the state" under Government Code section 17514.

Representation at Interrogation

Government Code section 3303, subdivision (i), provides that the peace officer "shall" have the right to be represented during the interrogation when a formal written statement of charges has been filed or whenever the interrogation focuses on matters that are likely to result in punitive action.

The claimant contends that Government Code section 3303, subdivision (i), results in reimbursable state mandated activities since additional professional and clerical time is needed to schedule the interview when the peace officer asserts the right to representation.[49]

Staff disagrees with the claimant's contention. Before the enactment of the test claim legislation, peace officers had the same right to representation under Government Code sections 3500 to 3510, also known as the Meyers-Milias-Brown Act (MMBA). The MMBA governs labor management relations in California local governments, including labor relations between peace officers and employers.[50]

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[48] Exhibit L, Comments to Draft Staff Analysis.

[49] Claimant's filing dated September 5, 1997. (Exhibit F)

[50] *Santa Clara County Dist. Attorney Investigators Assn.* v. *County of Santa Clara* (1975) 51 Cal.App.3d 255. (Exhibit A, Bates page 0301.)

Government Code section 3503, which was enacted in 1961, provides that employee organizations have the right to represent their members in their employment relations with public agencies. The California Supreme Court analyzed section 3503 in *Civil Service Association* v. *City and County of San Francisco*, a case involving the suspension of eight civil service employees. The court recognized an employee's right to representation under the MMBA in disciplinary actions.

> "We have long recognized the right of a public employee to have his counsel represent him at disciplinary hearings. (*Steen* v. *Board of Civil Service Commr.* (1945) 26 Cal.2d 716, 727; [Citations omitted.]) While *Steen* may have dealt with representation by a licensed attorney, the right to representation by a labor organization in the informal process here involved seems to follow from the right to representation contained in the Meyers-Milias-Brown Act and the right to representation recognized in *Steen*."[51]

Peace officers employed by school districts have similar rights under the Educational Employment Relations Act, beginning with Government Code section 3540.[52]

Based on the foregoing, staff finds that the right to representation at the interrogation under Government Code section 3303, subdivision (i), *does not* constitute a new program or higher level of service under article XIII B, section 6 of the California Constitution.

Adverse Comments in Personnel File

Government Code sections 3305 and 3306 provide that no peace officer "shall" have any adverse comment entered in the officer's personnel file without the peace officer having first read and signed the adverse comment.[53] If the peace officer refuses to sign the adverse comment, that fact shall" be noted on the document and signed or initialed by the peace officer. In addition, the peace officer "shall" have 30 days to file a written response to any adverse comment entered in the personnel file. The response "shall" be attached to the adverse comment.

Thus, Government Code sections 3305 and 3306 impose the following requirements on employers:

- To provide notice of the adverse comment;[54]
- To provide an opportunity to review and sign the adverse comment;
- To provide an opportunity to respond to the adverse comment within 30 days; and

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[51] *Civil Service Assn.*, *supra*, 22 Cal.3d 552, 568.

[52] Government Code section 3543.2, which was added in 1975 (Stats. 1975, c. 961) provides that school district employees are entitled to representation relating to wages, hours of employment, and other terms and conditions of employment.

[53] The court in *Aguilar* v. *Johnson* (1988) 202 Cal.App.3d 241, 249-252 (Exhibit A, Bates page 0171), held that an adverse comment under Government Code sections 3305 and 3306 include comments from law enforcement personnel and citizen complaints.

[54] Staff finds that notice is required since the test claim legislation states that "no peace officer shall have any adverse comment entered in the officer's personnel file *without the peace officer having first read and signed the adverse comment*." Thus, staff finds that the officer must receive notice of the comment before he or she can read or the document.

- To note on the document that the peace officer refused to sign the adverse comment and to obtain the peace officer's signature or initials under such circumstances.

The claimant contends that county employees have a pre-existing statutory right to inspect and respond to adverse comments contained in the officer's personnel file pursuant to Government Code section 31011. The claimant further states that Labor Code section 1198.5 provides city employees with a pre-existing right to review, but not respond to, adverse comments. Thus, the claimant contends that Government Code sections 3305 and 3306 constitute a new program or higher level of service under article XIII B, section 6 of the California Constitution.

As described below, staff finds that Government Code sections 3305 and 3306 constitute a *partial* reimbursable state mandated program.

Due Process

Under due process principles, an employee with a property or liberty interest is entitled to notice and an opportunity to respond, either orally or in writing, prior to the disciplinary action proposed by the employer.[55] If the adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer or harms the officer's reputation and opportunity to find future employment, then the provisions of the test claim legislation which require notice and an opportunity to review and file a written response are already guaranteed under the due process clause.[56] Under such circumstances, staff finds that the notice, review and response requirements of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution. Moreover, pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing notice and an opportunity to respond do not impose "costs mandated by the state".

However, under circumstances where the adverse comment affects the officer's property or liberty interest as described above, the following requirements imposed by the test claim legislation *are not* required by the due process clause:

- Obtaining the signature of the peace officer on the adverse comment, or
- Noting the peace officer's refusal to sign the adverse comment and obtain the peace officer's signature or initials under such circumstances.

In their comments to the Draft Staff Analysis, the Department of Finance and the State Personnel Board state the following: "If the adverse comment can be considered a 'written reprimand,' however, the POBOR required 'notice' and the 'opportunity to respond' may already be required by due process. The extent of due process due an employee who suffers an official reprimand is not entirely clear." [57]

Staff agrees that if the adverse comment results in, or is considered a written reprimand, then notice and an opportunity to respond is already required by the due process clause and are not reimbursable state mandated activities. However, due process does not require the local agency to obtain the signature of the peace officer on the adverse comment, or note the peace officer's

[55] *Skelly, supra*, 15 Cal.3d 194.

[56] *Hopson, supra*, 139 Cal.App.3d 347.

[57] Exhibit L.

refusal to sign the adverse comment and obtain the peace officer's signature or initials under such circumstances. Accordingly, staff finds that that these two activities required by the test claim legislation when an adverse comment is received constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514 even where there is due process protection.

The Legislature has also established protections for local public employees similar to the protections required by Government Code sections 3305 and 3306 in statutes enacted prior to the test claim legislation. These statutes are discussed below.

Existing Statutory Law Relating to Counties

Government Code section 31011, enacted in 1974,[58] established review and response protections for county employees. That section provides the following:

> "Every county employee shall have the *right to inspect and review* any official record relating to his or her performance as an employee or to a grievance concerning the employee which is kept or maintained by the county; provided, however, that the board of supervisors of any county may exempt letters of reference from the provisions of this section.
>
> The contents of such records shall be made available to the employee for inspection and review at reasonable intervals during the regular business hours of the county.
>
> The county shall provide an opportunity for the employee to *respond* in writing, or personal interview, to any information about which he or she disagrees. Such response shall become a permanent part of the employee's personnel record. The employee shall be responsible for providing the written responses to be included as part of the employee's permanent personnel record.
>
> *This section does not apply to the records of an employee relating to the investigation of a possible criminal offense.*" (Emphasis added.)

Therefore, under existing law, counties are required to provide a peace officer with the opportunity to review and respond to an adverse comment *if* the comment *does not* relate to the investigation of a possible criminal offense.[59] Under such circumstances, staff finds that the review and response provisions of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service.

However, even if the adverse comment *does not* relate to the investigation of a possible criminal offense, the following activities required by the test claim legislation were not required under existing law:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or

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[58] Stats. 1974, c. 315.

[59] Staff finds that Government Code section 31011 does *not* impose a notice requirement on counties since section 31011 does not require the county employee to review the comment *before* the comment is placed in the personnel file.

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, staff finds that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, staff finds that when the adverse comment *does* relate to the investigation of a possible criminal offense, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Existing Statutory Law Relating to Cities and Special Districts

Labor Code section 1198.5, enacted in 1975,[60] established review procedures for public employees, including peace officers employed by a city or special district. At the time the test claim legislation was enacted, Labor Code section 1198.5 provided the following:

> "(a) Every employer shall at reasonable times, and at reasonable intervals as determined by the Labor Commissioner, upon the request of an employee, permit that employee to inspect such personnel files which are used or have been used to determine that employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.
>
> (b) Each employer subject to this section shall keep a copy of each employee's personnel file at the place the employee reports to work, or shall make such file available at such place within a reasonable period of time after a request therefor by the employee. *A public employer shall, at the request of a public employee, permit the employee to inspect the original personnel files* at the location where they are stored at no loss of compensation to the employee.
>
> (c) *This section does not apply to the records of an employee relating to the investigation of a possible criminal offense.* It shall not apply to letters of reference.
>
> (d) If a local agency has established an independent employee relations board or commission, any matter or dispute pertaining to this section shall be under the jurisdiction of that board or commission, but an employee shall not be prohibited from pursuing any available judicial remedy, whether or not relief has first been sought from a board or commission.
>
> (e) This section shall apply to public employers, including, but not limited to, every city, county, city and county, district, and every public and quasi-public agency. This section shall not apply to the state or any state agency, and shall not

[60] Stats. 1975, c. 908, § 1.

apply to public school districts with respect to employees covered by Section 44031 of the Education Code. Nothing in this section shall be construed to limit the rights of employees pursuant to Section 31011 of the Government Code or Section 87031 of the Education Code, or to provide access by a public safety employee to confidential preemployment information."[61] (Emphasis added.)

Therefore, under existing law, cities and special districts are required to provide a peace officer the opportunity to review the adverse comment *if* the comment *does not* relate to the investigation of a possible criminal offense.[62] Under such circumstances, staff finds that the review provisions of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service.

However, even if the adverse comment *does not* relate to the investigation of a possible criminal offense, the following activities required by the test claim legislation were not required under existing law:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, staff finds that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

thermore, staff finds that when the adverse comment *does* relate to the investigation of a ssible criminal offense, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Existing Statutory Law Relating to School Districts

Education Code section 44031 establishes notice, review and response protections to peace officers employed by school districts. Section 44031 provides in relevant part the following:

---

[61] Labor Code section 1198.5 was amended in 1993 to delete all provisions relating to local public employers (Stats. 1993, c. 59.) The Legislature expressed its intent when enacting the 1993 amendment "to relieve local entities of the duty to incur unnecessary expenses..."

[62] Staff finds that Labor Code section 1198.5 does *not* impose a notice requirement on counties since section 1198.5 does not require the city or special district employee to review the comment *before* the comment is placed in the personnel file.

"(a) Materials in personnel files of employees that may serve as a basis for affecting the status of their employment are to be made available for the inspection of the person involved.

"(d) *Information of a derogatory nature, except [ratings, reports, or records that were obtained in connection with a promotional examination], shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon.* An employee shall have the right to enter, and have attached to any derogatory statement, his own comments thereon...." (Emphasis added.)

Education Code section 87031 provides the same protections to community college district employees.[63]

Therefore, existing law, codified in Education Code sections 44031 and 87031, requires school districts and community college districts to provide a peace officer with notice and the opportunity to review and respond to an adverse comment *if* the comment *was not* obtained in connection with a promotional examination. Under such circumstances, staff finds that the notice, review and response provisions of Government Code sections 3305 and 3306 do *not* constitute a new program or higher level of service.

However, even when Education Code sections 44031 and 87031 apply, if the adverse comment *was not* obtained in connection with a promotional examination, the following activities required by the test claim legislation were not required under existing law:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, staff finds that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, staff finds that when the adverse comment is obtained in connection with a promotional examination, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

[63] Education Code sections 44031 and 87031 were derived from Education Code section 13001.5, which was originally added by Statutes of 1968, Chapter 433.

Conclusion and Staff Recommendation

Based on the foregoing analysis, staff finds that the test claim legislation constitutes a partial reimbursable state mandated program pursuant to article XIII B, section 6 of the California Constitution for the following reimbursable activities:

1. Providing the opportunity for an administrative appeal for the following disciplinary actions (Gov. Code, § 3304, subd. (b)):
   - Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e., the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
   - Transfer of permanent, probationary and at-will employees for purposes of punishment;
   - Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
   - Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.
2. Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
3. Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)
4. Producing transcribed copies of any notes made by a stenographer at an interrogation, and reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer in the following circumstances (Gov. Code, § 3303, subd. (g)):
   (a) When the investigation *does not* result in disciplinary action; and
   (b) When the investigation results in:
   - A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e., the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
   - A transfer of a permanent, probationary or at-will employee for purposes of punishment;
   - A denial of promotion for a permanent, probationary or at-will employee for reasons other than merit; or
   - Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career of the employee.
5. Performing the following activities upon receipt of an adverse comment (Gov. Code, §§ 3305 and 3306):

School Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then schools are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Counties

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then counties are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Cities and Special Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then cities and special districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Staff Recommendation

Staff recommends that the Commission approve this test claim accordingly.

Originated: 04/03/1996 Mailing Information August 26, 1999 Hearing - Staff Anlaysis

Mailing List

GB # CSM-4499 Claimant City of Sacramento Test Claim

nment Code Section amending sections 3300-3310

ers 465/76, 775, 1173, 1174, 1175/78, 1367/80, 944/82, 964/83, 1165/89, 675/90,

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CSM-4499 **Claimant** City of Sacramento Test Claim

rt Code Section amending sections 3300-3310

465/76, 775, 1173, 1174, 1175/78, 1367/80, 944/82, 964/83, 1165/89, 675/90,

Peace Officers Procedural Bill of Rights

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Post-it® Fax Note 7671	Date 9/28	# of pages 1
To Paula Higashi	From Pam Stone	
Co./Dept. CSM	Co. DMG-Maximus	
Phone # 323-3562	Phone # 485-8102	
Fax # 445-0278	Fax # 485-0111	

September 28, 1999

LATE FILING

ITEM 6

Ms. Paula Higashi
Executive Director
Commission on State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814

Re: Peace Officer's Bill of Rights
No. CSM 4499
Hearing on Statement of Decision

Dear Ms. Higashi:

At the request of the City of Sacramento, and Ms. Dee Contreras in particular, I am writing to request that the hearing on the Statement of Decision be continued until the Commission's November hearing date. Ms. Contreras telephoned me this morning to inform me that due to situations which had just arisen in her office, she will be unable to attend this Thursday's Commission meeting. She wishes to speak to the issue of the taping of interrogations and subsequent transcription as raised in the proposed Statement of Decision. She then inquired as to the date of October's meeting, and she informed me that she will be in Monterey all that day, doing a state-wide training. Accordingly, she has requested that this matter be continued until November's hearing date.

I apologize for the lateness of the request. However, as I will be out of the office tomorrow, I would appreciate your response today.

Thank you for your courtesy and cooperation.

Very truly yours,

Pamela A. Stone
Legal Counsel

cc: Dee Contreras

PUBLIC HEARING

COMMISSION ON STATE MANDATES

--o0o--

TIME: 9:30 a.m.

DATE: September 30, 1999

PLACE: State Capitol, Room 437
Sacramento, California

ORIGINAL

--o0o--

REPORTER'S TRANSCRIPT OF PROCEEDINGS

--o0o--

Reported By: YVONNE K. FENNER, CSR License #10909, RPR

AGENDA INDEX

--o0o--

example of what a claim looked like.

MR. BELTRAMI: Well, you have four books' worth of examples.

CHAIRPERSON PORINI: All right.

MR. CUNNINGHAM: Thank you.

CHAIRPERSON PORINI: Okay. Thank you very much.

At this time we're going to take a five-minute break.

(Recess taken.)

CHAIRPERSON PORINI: All right. Should we go ahead and get started. Let's give our audience a moment to get back in their seats.

Okay. So Item No. 6 has been held over. That moves to Item No. 7?

MS. HIGASHI: That's correct. Related to Item No. 7, the Commission received a request from the Long Beach Unified School District to disqualify the Department of Finance and all representatives of the Department of Finance in the special education cases now pending before the Commission. Copies of this written request and affidavit were distributed to you before this hearing.

Staff recommends that the district be permitted to present its request for disqualification, followed by a response from the Department of Finance representative, then the other members may determine if they choose to act on the district's request.

CHAIRPERSON PORINI: Okay. I will go ahead and

MINUTES
COMMISSION ON STATE MANDATES
Thursday, September 30, 1999
State Capitol, Room 437
Sacramento, California

9:30 A.M. - PUBLIC MEETING AND HEARING

Present: Chairperson Annette Porini
Representative of the Director of the Department of Finance
Vice Chair William Sherwood
Representative of the State Treasurer
Member Millicent Gomes
Representative of the Director of the Office of Planning and Research
Member Barrett McInerney
Representative of the State Controller
Member Albert Beltrami
Public Member
Member Joann Steinmeier
Representative of School Boards

I. CALL TO ORDER AND ROLL CALL

Chairperson Porini called the meeting to order at 9:32 a.m.

II. CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTION 11126.

Closed Executive Session was cancelled.

III. REPORT FROM CLOSED EXECUTIVE SESSION

None.

IV. PROPOSED CONSENT CALENDAR

With a motion by Member Steinmeier and a second by Member Beltrami, Items 9, 10, and 11 were unanimously adopted on consent.

V. APPROVAL OF MINUTES (action)

Item 1 August 26, 1999

Item 2 September 15, 1999

Member McInerney moved for adoption. Member Beltrami requested a modification to the August 26, 1999 minutes. As written, the minutes said that Member Beltrami "thought" the City should like the subject legislation. He clarified that he had actually said he thought the Personnel Board *made an interesting argument that the City should like this legislation* because it tightens up things and should therefore save money in the long run. With a second by Member Steinmeier, the minutes were adopted, as modified, unanimously. Member Sherwood abstained.

VI. HEARINGS AND DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (action)

A. TEST CLAIMS

Item 3 *Behavioral Intervention Plans* - CSM-4464
Butte County Office of Education, San Diego Unified School District, and San Joaquin County Office of Education, Co-Claimants
Education Code Section 56523
Statutes of 1990, Chapter 959
Title 5, California Code of Regulations,
Sections 3001 and 3052

David Scribner of Commission staff introduced this item. He noted that the test claim legislation and implementing regulations imposed a new program or higher level of service on school districts by requiring them to develop and implement behavioral intervention plans, which were not required under prior law. Federal law did not require the development and implementation of behavioral intervention plans when the test claim legislation was enacted. Further, behavioral intervention plans are not required under the Code of Federal Regulations. Case law from other jurisdictions illustrates that federal law recognizes that there are a variety of strategies that ensure disabled children receive a free appropriate public education, whereas state law requires development and implementation of behavioral intervention plans whenever a child exhibits a serious behavior problem. Mr. Scribner added that Government Code section 17556, subdivision (e), does not preclude the finding of a mandate because the test claim legislation did not specifically provide funding for the behavioral intervention plan program.

Parties were represented as follows: Jim Cunningham, co-claimant, with the San Diego Unified School District; Frank Terstegge, SELPA Director, with the Butte County Office of Education; Carol Berg with the Education Mandated Cost Network; Dan Stone, Deputy Attorney General, and Kathy Gaither, for the Department of Finance. The parties were sworn in.

Jim Cunningham noted that, though he mildly disagrees with staff's analysis, he recommended the Commission approve staff's recommendation. He disagreed with Department of Finance and argued that the funding was not specifically intended to cover the costs of this mandate—in fact, Statutes of 1990, Chapter 959, does not include an appropriation. Mr. Cunningham distributed copies of the 1991 Budget Bill, the first budget passed following the adoption of the test claim legislation. He alleged that the Legislature identified specific subappropriations in that bill, but behavioral intervention plans was not one of them.

Mr. Stone contended that it was inappropriate to discuss the offset issue because it is an issue in the Riverside claim which has been continued for discussion in late October. He requested the Commission delay consideration until it has determined the issue in its more broadly briefed and argued context in the Riverside manner. Mr. Stone argued that the state's requirements are intended to fill in the gaps and provide a manner to satisfy the federal requirements. He noted that subsequent amendments to federal law expressly include behavioral intervention plans as a means of satisfying the need to deal with children with serious behavioral problems. Since behavioral interventions is an acceptable way to satisfy the federal requirements, it is not a state mandate.

Ms. Gaither submitted that the state law is implementing the federal requirement to provide each child with their civil right to a free appropriate education—if an IEP team finds after consideration that a child needs behavioral intervention, it is required by federal law.

Member McInerney asked if the state allowed the locals to make the decisions about which specific tools to use if that would have kept the state out of it entirely. Mr. Stone responded that it would have, though the state is not allowed to do so because the federal mandate goes to both the state and locals. Member McInerney asked why the state could not have passed the federal mandate onto locals without specifying the specific tool to use. Mr. Stone replied that that might have exposed the state to litigation.

Ms. Gaither added that special education is different from other educational programs because of the specific federal requirement to protect children's civil rights. She submitted that the Legislature attempted to walk the fine line between protecting the policy interests of the state, which includes providing an adequate education to every child, while allowing some measure of local flexibility and control. Ms. Gaither explained that federal law requires the state to submit an annual plan that includes how the state will ensure that children receive services to which they are entitled.

In response to Member McInerney, Ms. Gaither said that the state would be violating the federal requirements if it submitted a plan to the federal government allowing for local discretion as to which tools are used. She submitted that, when former Governor Deukmejian was considering not extending the sunset date of law relating to special education, the federal government threatened to withdraw all federal support.

Member McInerney noted that having no law, and submitting a plan giving locals discretion, are two different situations. He asked, when the state limits the option of districts by requiring behavioral intervention plans, why that would not be a mandate. Ms. Gaither responded that behavioral intervention includes a variety of strategies. Member McInerney noted that, where the circumstances are met, a behavioral intervention plan is required by the state and it must be done in a manner consistent with the directions and context that the state set forth. Ms. Gaither responded that some flexibility exists in how the policy is adopted at the local level, but there are required elements to the plan which are designed to ensure that the children are protected. Member McInerney commented that, if there are required elements, it seems a mandate would exist and that the Commission should move to the parameters and guidelines phase to determine what those elements are.

Mr. Stone agreed that the state has taken away some discretion from the locals, but the reason for the requirement was the federal mandate requiring some response in these situations; the Legislature's approach falls under the umbrella of federal requirements.

Member McInerney stated that the federal mandate contained an entire range of possibilities which were narrowed down by the state as to a particular, singular direction. He added that, when the state intervenes in that manner, it is not mandating a wide-ranging federal mandate, but a very specific state direction on the local agencies. Mr. Stone agreed, but again submitted that the state direction is within the federal mandate.

Member McInerney asked if Mr. Stone was contending that, if the state does anything "philosophically consistent" with a federal mandate, then any specific direction given by the state would be subsumed into the federal mandate. Mr. Stone replied that, in this case, the state had court decisions, regulations, and amendments to statutes that plainly say that what the state did is an appropriate response to the federal mandate.

Mr. Cunningham noted that, up until the 1997 IDEA amendments, federal law and regulations did not require any kind of behavioral intervention strategy or plan. Even then, Congress only

said you shall consider, if appropriate, strategies to address the behavior, which may include behavioral intervention plans. He added that a strategy, under federal law, is not the same as a plan, with all of the extras included in that plan under section 3052. Mr. Cunningham noted that, only after the regulations went into place, did the state plan start to include provisions regarding behavioral interventions, and that was a reaction to the state requirement and not to federal law.

Member Steinmeier felt it was clear that not everything the state does is a federal mandate when it comes to special education. She agreed with the staff analysis that the differences between state and federal law in this case indicate that there is a state mandate.

Member Gomes thought that the plan fits into the *related services* definition in the Code of Federal Regulations. She asked staff why it narrowed its analysis to *psychological services* when the federal regulations discuss other *related services*.

Mr. Scribner replied that *psychological services* was modified at a later date to mention behavioral intervention plans. Further, federal law includes options where the state does not. Member Gomes noted that *psychological services* includes "other procedures," and asked if the plan would be an assessment for improving the child's behavior.

Mr. Scribner agreed that it is another assessment procedure, but noted again that it is one of the many options districts could implement under federal law, whereas state law does not allow for assessment procedures other than behavioral intervention plans.

Chairperson Porini shared Member Gomes concern, noting that she believed a behavioral intervention plan could easily be described as other supportive services. Mr. Scribner reiterated the fact that, while they may fall under other supportive services or corrective actions, federal law does not restrict districts to using behavioral intervention plans.

Member Sherwood agreed with Members Gomes and Porini that behavioral intervention plans fall within the general federal law. He believed the state does have the ability to set some standards, and asked if the state is really voluntarily restricting locals, or if it is doing something that it feels is necessary to protect the children in this environment.

Mr. Scribner believed the state was voluntarily doing this to protect the children. According to *Hayes*, the Commission is supposed to be looking at what the state has done in excess of the federal requirements. Mr. Scribner submitted that the state's requirements exceed the federal's by restricting the options of districts.

Mr. Cunningham did not think Congress was operating under the definition of *psychological services*. He added that other states have not imposed this requirement and their state plans have been approved.

Member Gomes agreed that this does not necessarily fit into *psychological services*, but had difficulty separating it from the other developmental and corrective services and other supportive services delineated under federal regulations. She added that some states, or school districts within, failed to include a behavioral management program, and the court decided they failed to provide a free appropriate public education and therefore violated the provisions of the IDEA.

Mr. Terstegge explained that behavioral analysis with a positive behavior approach is not a general broad methodology—it is a narrow, specific methodology in education. He believed it goes beyond the federal intent and that it is, in a sense, a very dangerous legislation because of

the narrow specificity that it imposes on students. Mr. Terstegge noted the significant increase in costs due to the Hughes bill that imposes this requirement.

Member Beltrami asked if federal law requires room and board if a handicapped child is residing with a grandparent while attending special education school. Ms. Gaither replied that federal law is not specific, but rather requires that children receive whatever necessary to have a free appropriate public education. She added that, while it may be more expensive to do things in a way that is safe for children, that does not constitute a state mandate. Ms. Gaither submitted that the state is responding to federal law and other requirements that require the state to keep its children safe.

Member Beltrami disagreed with Mr. Stone's argument that the federal umbrella covers all activities related to special education. He noted that the Commission had found exceptions where the state's requirements exceeded the federal requirements, but was undecided as to whether the state had exceeded federal requirements in this case.

Mr. Terstegge contended that the state could have accomplished the same thing and given locals the latitude they needed by simply prohibiting certain interventions that were dangerous. The Chair asked if districts put interventions in place in that case. Mr. Terstegge said that they do not, however, they are required to go through the process of the assessment and a series of meetings to determine that intervention is inappropriate. Ms. Gaither responded that the state considered prohibiting certain interventions, but that would have put it in violation of federal law.

Member Gomes submitted that behavioral intervention plans fall underneath federal law where it says districts can use, when appropriate, positive behavioral interventions.

Member Steinmeier asked staff if it had considered including in its staff analysis any of the language changes requested by Mr. Cunningham in his late filing. Mr. Scribner replied that the focus of that filing was to clarify that federal law does not speak of behavioral intervention plans, but behavioral intervention strategies, which are entirely different. He said that staff does support those modifications.

Member Gomes moved to find that a state mandate does not exist. Chairperson Porini seconded the motion, which ended in a tie vote. (Members Gomes, Sherwood, and Porini voted "Aye," and Members McInerney, Steinmeier, and Beltrami voted "No.") No action was taken.

B. INCORRECT REDUCTION CLAIM

Item 4 Request for Disqualification of the Commission Member Representing the State Controller pursuant to California Code of Regulations, Title 2, Section 1187.3, Subdivision (b), on Item 5, Open Meetings Act - CSM-96-4257-I-b, CSM-98-4257-I-54. Request of the San Diego Unified School District, Claimant, dated August 27, 1999.

Ms. Higashi introduced this item, explaining that the San Diego Unified School District filed its original request to disqualify the State Controller's Office (SCO) representative from hearing any matter relating to the incorrect reduction claim (IRC) filed by the district on the *Open Meetings Act*. Staff recommended permitting the district to present its request, followed by a response from the SCO. The other members could then choose to act upon the district's request.

Jim Cunningham, the requester, submitted the following:

- The SCO is a party to this action and due process requirements indicate that one cannot be a party and a decision-maker.
- Disqualification is proper under the principles embodied in the Code of Civil Procedure section 170.1, subdivision (a)(6)(C) and in the cases cited in his written materials regarding reasonable doubt that the designee would be impartial.
- There has been improper ex parte communications involving the SCO representative and the SCO staff.

Carol Berg, with the Education Mandated Cost Network, clarified that this request in no way reflects upon the SCO representative—it is a philosophical issue. Secondly, the SCO has historically resolved this issue in the same way, so Dr. Berg wanted to be on record requesting that parties do separate those activities when appropriate.

Member McInerney responded with the following:

- The SCO is not a party to the IRC—the witnesses to the claim come from a separate section of the office and there is no financial or other incentive the SCO has to make a decision either way.
- Regarding impartiality, Member McInerney makes decisions independently at the hearing. He does have discussions with the Controller, though he has not had a specific discussion with the Controller on this particular issue. He assured the claimants that they would receive a fair and impartial decision.

Hearing no motion, the Chair proceeded onto Item 5.

Item 5 *Open Meetings Act* - CSM-96-4257-I-b; CSM-98-4257-I-54
San Diego Unified School District, Claimant
Statutes of 1986, Chapter 641

Nancy Patton of the Commission staff introduced this item. She noted that existing law requires the Commission to hear and decide claims by local agencies and school districts that the State Controller's Office (SCO) incorrectly reduced their claims for reimbursement. The subject claim involves claims regarding the Open Meetings Act. The SCO developed claim settlement instructions in consultation with local agency and school district representatives to clarify how reimbursement claims should be filed. The claimant submitted its claims accordingly. The SCO agrees with the claimant that appropriate documentation showing actual costs was submitted. However, the SCO subsequently developed a general time guideline of 30 to 45 minutes per page and applied this guideline to the claimant's claims. Costs exceeding this time guideline were disallowed. On July 26, 1996, the SCO reduced the claimant's claims due to excessive costs. The following three issues are in dispute:

- Did the SCO perform a proper audit? Staff found no evidence that an improper audit was performed.
- Is the SCO's development and use of a general time guideline in violation of the Administrative Procedures Act? Staff found that the Commission does not have jurisdiction to decide this issue, rather, this authority rests with the Office of Administrative Law (OAL).
- Did the SCO's use of the guideline result in an incorrect reduction of the claimant's claims? Based on a review of SCO methodology, staff found that the SCO incorrectly disregarded the documentation submitted by the claimant, thereby disallowing costs eligible for

reimbursement. Staff also found that the guideline was not reasonable or representative of the claimant.

Staff therefore recommended the Commission find that the SCO incorrectly reduced the claimant's claims.

Parties were represented as follows: Jim Cunningham for the San Diego Unified School District; Carol Berg for the Education Mandated Cost Network; and, Jeff Yee, William Ashby, and Sonia Hehir, all for the State Controller's Office. Ms. Higashi swore in the witnesses not previously sworn.

Regarding the first issue, Mr. Cunningham contended that there is nothing on the record showing that the SCO did do a proper audit, and that the record shows the SCO merely counted agenda pages and applied the guideline to adjust the claims. He alleged that the SCO had to adjust not only his claims, but all claims. Handing out copies of the SCO's "Explanation for Audits Exceptions Worksheets," Mr. Cunningham argued that the SCO file notes eliminate any doubt as to whether an improper audit was performed: "It would not be feasible to spend the time adding every sheet. [Therefore, the SCO said it was] okay to automatically use 35 minutes per page."

Regarding the second issue, Mr. Cunningham agreed with staff that the OAL has the jurisdiction to decide whether there is underground or illegal rulemaking. However, he believed the Commission could decide that there is undisputed evidence the SCO used underground rulemaking based upon the SCO's free admission that it adopted and intended to enforce its time guideline as a standard of general application.

Regarding the third issue, Mr. Cunningham agreed with staff that the SCO's adjustments were arbitrary and unreasonable. He submitted that the SCO never showed any reason why their standard has any relation to the mandated costs—they have applied a standard that is not supported by the data. Mr. Cunningham added that not all districts are similar. In a large school district, there are more people involved in the agenda description procedure. He requested the Commission approve staff's recommendation.

Dr. Berg noted that, if a unit cost is to be applied, that is within the purview of the Commission, and not by the SCO after the fact.

Ms. Hehir, Staff Counsel, explained that the SCO is charged with the statutory duty to rigorously review each claim and reduce those deemed excessive or unreasonable. She submitted that the SCO has attempted to carry out this judgmental responsibility under the law and in light of the facts presented. She distributed a histogram showing costs claimed under this mandate for use during the presentation of William Ashby.

Mr. Ashby, Division Chief of Accounting and Reporting, clarified that this was not a statistical sample. He explained that the SCO's initial analysis included all entities, not just school districts. Mr. Ashby submitted that the minutes per page analysis was done only for districts because the SCO found they had a significant amount of variability in dollar amounts claimed, dollar amounts of staff pay, and number of staff. One entity claimed $5 per page and another $1400. The SCO used the mode, which was $20 per page. Based on their analysis, this approximated to 35 to 50 minutes per page. He claimed that the SCO did compensate entities for a range—the analyst could reimburse $35 to $45 per page. He noted other cases of extreme variability in claims. Mr. Ashby contended that the SCO defined what they thought was reasonable, or not excessive, and applied a rigorous standard.

Jim Apps maintained that the SCO's application of a standard of reasonableness is appropriate. He contended that the basic requirement is fairly specific in state law and that is all the SCO is prepared to reimburse. The DOF supported the SCO in that endeavor.

Member Steinmeier clarified that the SCO did not consider the size of the entity in its analysis, rather, it considered only the number of pages. Mr. Ashby agreed. Member Steinmeier explained that, realistically, organizations that are more complex sometimes take longer to reach a consensus. Mr. Ashby argued that discussion time is not a reimbursable mandated cost, only time to prepare and post the agenda. Member Steinmeier responded that it depends on how many people must review it. She thought size of the entity should be taken into consideration, because complex entities may have more than one person review an item. Mr. Ashby countered that that was up to the school.

Member Steinmeier added that the Open Meetings Act law created complicated matters by restricting item descriptions to 20 words. She stated that the question now was whether the SCO's analysis was adequate to explain the variability between entities. Member Steinmeier did not think it was. Mr. Ashby disagreed.

Member Beltrami agreed with Member Steinmeier that variability should be considered. However, he also agreed with the SCO that there must be some way to enforce reasonableness.

Member McInerney asked if there was a decision in the SCO between September 20, 1995, the date the revised claim settlement instructions were issued, and July of 1996, the date the reduction was announced, to change the method in which claims would be reviewed without going back to the parties involved in the original claim settlement instructions for input. Ms. Hehir replied that the change was not made with the approval of those organizations.

Member McInerney asked if, prior to notice of reduction to the claimant, if the claimant was advised that the SCO was using a unit cost analysis for the final reduction as opposed to the revised claiming instructions. Ms. Hehir responded that the letter identifying the reasons for reduction did not fully articulate that it was done on a 30 to 35 minute basis. Member McInerney clarified that, when the reduction was communicated in July of 1996, it was a fait accompli. Ms. Hehir agreed.

Mr. Cunningham assured Member McInerney that his records showed no communication from the SCO. In fact, when he received the reduction and requested more details on the reasons, he was stonewalled and had to make a public records request to review the files and find these standards.

Member Beltrami asked if Mr. Cunningham thought it was an appropriate charge to the State and people of California if 80 people were involved in putting an agenda together. Mr. Cunningham replied that his is a large organization with procedures to follow and several layers of management.

Member Beltrami asked what Mr. Cunningham thought the Legislature meant when it decided that the Act should be interpreted strictly and that its intent was to provide reimbursement when an organization clearly and unequivocally incurs a direct and necessary result. Mr. Cunningham responded that the California Newspaper Publishers Association, among others, was concerned that, if this mandate were found to have a large cost, the Legislature may no longer require these agenda descriptions that enable them to know what is going on within an organization.

Member Beltrami asked the SCO about offsetting for boilerplate language that was less complicated than legal descriptions. Mr. Ashby maintained that the agendas were so complex and variable, that the SCO did not attempt to consider boilerplate, margins, font size, etc. In some

cases, the SCO may have overcompensated. Mr. Cunningham added that he has evidence in the audit notes that the SCO did deduct pages.

Member Steinmeier asked if the Commission failed to indicate in its Parameters and Guidelines how reimbursement should occur, and whether the Commission considered unit cost. Ms. Shelton replied that, though unit cost was never proposed, any party could come back and request an amendment to the Parameters and Guidelines to include it. In response to Member Porini, Ms. Shelton said that there is no time line on amending parameters and guidelines.

Member McInerney believes that unit cost is the best approach for both the claimant and the SCO. He added that, while the SCO probably had good faith in using unit cost, he was concerned that shifting the way the SCO analyzes claims without notification creates a moving target for claimants.

Mr. Ashby responded that the time period for appropriation was about to expire, so a decision had to be made quickly as to how to compensate the claimants; there was no time to seek an amendment to the Parameters and Guidelines. Further, the SCO currently applies some time study or analysis of costs in their procedural review of claims to determine variability so they do not compensate claimants for excessive costs.

Mr. Cunningham again argued that the data did not support the SCO's 30-minute standard. Member Sherwood replied that the data can be viewed differently, as it was by the SCO. Like Member McInerney, he was more concerned with the lack of notification.

Member Steinmeier moved for adoption of the staff analysis. Member Sherwood seconded the motion. The motion carried 5-1, with Member Beltrami voting "No."

In conclusion, Member Sherwood indicated his concern with the lack of give-and-take from both parties and the lack of notice. Member Beltrami indicated his desire for parties to somehow synthesize or generalize their documentation to avoid repetition.

[A brief recess was taken.]

C. ADOPTION OF PROPOSED STATEMENT OF DECISION

Item 6 *Peace Officers Procedural Bill of Rights* - CSM-4499
City of Sacramento, Claimant
Statutes of 1976, Chapter 465
Statutes of 1978, Chapters 775, 1173, 1174, and 1178
Statutes of 1979, Chapter 405
Statutes of 1980, Chapter 1367
Statutes of 1982, Chapter 944
Statutes of 1983, Chapter 964
Statutes of 1989, Chapter 1165
Statutes of 1990, Chapter 675

This item was continued at the request of the claimant.

REQUEST FOR RECONSIDERATION OF PRIOR FINAL DECISION PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1188.4.

Item 7 Long Beach Unified School District's June 24, 1996, Request to Hear and Decide Education Code Section 56026 - *Maximum Age Limit: Special Education for Ages 3 to 5, and 18 to 21*
Statutes of 1977, Chapter 1247
Statutes of 1980, Chapter 797, et al.
As Part of the Special Education Test Claim Filed by
Riverside County Superintendent of Schools and
Supplemental Claimants (Request to Reconsider the Statement of Decision dated November 30, 1998)

Ms. Higashi, Executive Director to the Commission, noted that, related to this item, the Commission received a request from Long Beach Unified School District to disqualify the Department of Finance (DOF) and all of its representatives in *Special Education* cases now pending before the Commission. Staff recommended permitting the district to present its request, followed by a response from the DOF representative. Other members could then choose whether to act on the request.

Vice Chairperson Sherwood assumed the role of Chair.

Joseph Mullender submitted his request for disqualification on the written papers.

Member Porini stated that this is a new administration, she is new to this position, to the DOF, and to this issue. She asked former representatives why they had disqualified themselves in past *Special Education* hearings and determined that they were all personal and individual decisions, not the decision of the DOF to disqualify its representative. Ms. Porini submitted that a 'fire wall' exists in her office—she does not participate in meetings or discussions relating to Commission issues. Finally, she believed she could be unbiased on this issue.

Member Beltrami noted that former Chairperson Dezember was advised by his attorneys to recuse. Member Porini clarified that the former Chair indicated that he disqualified himself for a personal reason. Hearing no motion, Chairperson Sherwood moved on. Member Porini resumed the role as Chair.

Camille Shelton of the Commission staff introduced Long Beach Unified School District's request for reconsideration. She explained that the Commission's regulations on reconsideration provide for a two-step process with two hearings. Today, the Commission would determine if it wished to grant the request. This requires a supermajority of five affirmative votes. If granted, a second hearing would be scheduled to determine if the Commission's prior final decision of November 30, 1998, is contrary to law, and, if so, to correct the error. That decision denied the claimant's request to include special education services for disabled children ages 3 to 5 and 18 to 21 as part of the consolidated claim filed by Riverside County Superintendent of Schools and the supplemental claimants.

Ms. Shelton briefly outlined the history of this issue and noted the two options for action: Option 1 grants the request for reconsideration and the item would be rescheduled for a second hearing to determine if there has been an error of law; Option 2 denies the request. If the Commission selects Option 2, the administrative law judge will begin considering the merits of the underlying test claim. Staff recommended approval of Option 1.

Parties were represented as follows: Joseph Mullender for the Long Beach Unified School District; and Dan Stone, Deputy Attorney General, and Katherine Gaither, both for the Department of Finance.

Mr. Stone disagreed with staff's analysis. He submitted the following:

- The consolidation was for the limited purpose of considering whether the state special education program exceeded the federal mandate.
- Santa Barbara's designated representatives, the Education Mandated Cost Network (EMCN) and the School Services of California, knew the consolidation was limited and that Santa Barbara had dropped out—it was a common understanding.
- This was part of the reason the Commission opened the Riverside claim to supplemental claimants, in case anyone else wanted to go beyond the 17 areas.
- There is no history of the Santa Barbara claim using the term "maximum age," as used by Long Beach in its request for reconsideration.
- One supplemental claimant, the North Region SELPA, filed a claim for 3 to 5 year olds. Mr. Stone contended that they filed this claim because they knew the Santa Barbara claim had been abandoned.
- Had Long Beach truly thought the Santa Barbara claim was included, it would have filed a supplemental claim to extend the claiming period back to 1980, because the Riverside claim was restricted to current law in 1993/94.
- The only shortcoming is the technical problem of indicating for the record that the Santa Barbara claim had been abandoned and would no longer be entertained—the DOF was willing to make a motion to dismiss the claim orally or in writing if necessary.

In response to Mr. Stone's allegations, Carol Berg with EMCN argued that the Riverside claim always intended to encompass the Santa Barbara claim. She added that the Riverside documentation does go back to 1980, though they later decided to present documentation from 1993. Finally, Dr. Berg submitted that, though Santa Barbara's name has not been raised until Long Beach submitted it, none of the parties had believed or agreed that claim had been abandoned.

Member Steinmeier wanted to confirm that the Commission was working under the assumption that Santa Barbara had essentially abandoned its claim and Riverside had taken over its place. She explained that that is what she had been told when she first became a member.

Ms. Shelton did not know what the intentions or discussions were back then, but noted that the staff analysis was written purely on the administrative record. The record does not indicate that Riverside was taking over Santa Barbara's claim. Ms. Shelton added that, though Santa Barbara has not participated since 1992 or 1993, the Commission has never dismissed the claim and Santa Barbara has never formally withdrawn it.

Member Beltrami questioned the March 6, 1995, letter from the Commission's executive director providing notice that the Santa Barbara claim had been dropped. Ms. Shelton replied that the letter does not mention the Santa Barbara claim at all, rather, the caption notes the test claim is of the Riverside County Superintendent of Schools. Further, the letter allows other claimants to file supplemental claims to Riverside's claim.

Member Beltrami asked about a party's rights. Ms. Shelton explained that the law says, until an administrative agency formally dismisses a case, it is still pending. The Commission's regulations currently only provide for a withdrawal by the claimant. She believed the Commission could dismiss the claim under common law, though a separate procedural hearing would still be necessary. The Commission would need to notify interested parties and other school districts and give them the opportunity to be heard.

Mr. Mullender argued that these cases can be dismissed for lack of prosecution, but the difference in procedure here as opposed to a normal court case is that it affects the rights of other similarly situation entities, just like a class action.

Member Beltrami asked why those other entities did not say or do anything after Santa Barbara disappeared from the scene. Dr. Berg argued that Riverside did come forward to take over the Santa Barbara claim and that the fact that Santa Barbara did not formally withdraw its claim, as required, means that the claim was not abandoned.

The Chair asked if the Commission has had any contact with Santa Barbara. Ms. Shelton noted that staff sent them a copy of staff's final analysis to put them on notice that there was an allegation being made that their claim was still pending. Staff has not received a response.

Member Beltrami asked if Santa Barbara was one of EMCN's clients. Dr. Berg responded that the county offices of 58 counties support the EMCN, so "yes" in that sense. However, she does not represent them.

Member Gomes moved for adoption of Option 2, to deny the request for reconsideration and allow the court in pending litigation to rule on the issue. Ms. Shelton clarified that, currently, there is no pending litigation so Option 2 would be limited to the denial. Member Gomes added that the motion included the Commission scheduling a second hearing to dismiss the Santa Barbara claim. Member Beltrami seconded the motion. Members Gomes, Porini, and Beltrami voted "Yes." Members McInerney, Sherwood, and Steinmeier voted "No." Member Sherwood clarified that they needed five votes to move ahead with the recommendation, so the Commission is actually voting on Option 1.

Member Steinmeier moved for adoption of Option 1, to grant the request for reconsideration and allow Long Beach to present its argument at a subsequent hearing.

In response to Member McInerney, Ms. Shelton said that there is nothing in the Commission's regulations allowing a claim to expire on its own. Member McInerney suggested the Commission continue the item, have a motion for dismissal filed, and then make a ruling between the reconsideration and motion to dismiss. Otherwise, the Commission would be acknowledging something that could not have happened procedurally.

Mr. Stone inquired whether the Commission, acting as a quasi-judicial tribunal, could dismiss the claim on its own, or if the motion must come from a party. Ms. Jorgensen replied that current regulations do not include procedures for the Commission to withdraw a claim or to say that the time has lapsed. Ms. Shelton reiterated her belief that, under common law, the Commission has the authority to dismiss. Member McInerney clarified that, since the claim affects school districts throughout the state, notices must be sent out and they must be given the opportunity to respond.

Member Steinmeier explained that that was the reason for her motion–to have an actual hearing on the issue and provide some finality. She wasn't actually supporting reconsideration, and noted that most likely the Commission would find the claim was deceased because it was not acted upon. Member Steinmeier believed the Commission should follow a formal procedural process.

Mr. Stone again offered to make a motion for dismissal, if necessary.

Member Beltrami seconded Member Steinmeier's motion for Option 1.

Mr. Mullender asked if the motion included giving notice. Ms. Shelton explained that Option 1 only grants the request for reconsideration. A second hearing would be held to discuss the merits of the Long Beach claim and then the Commission would decide whether there has been an error of law. If so, the Commission would change its prior statement of decision. The Chair clarified that this option does not address Santa Barbara's claim.

On a roll call vote, Members Beltrami, McInerney, Sherwood, and Steinmeier voted "Yes," and Members Gomes and Porini voted "No." Ms. Higashi explained that, since five votes are required to grant the request, the motion failed.

For procedural closure, Member McInerney moved to continue the request to a hearing when it could be joined with a motion to dismiss so there could be finality with respect to the Santa Barbara claim one way or another. Member Steinmeier seconded the motion. Member Beltrami clarified that that would ensure notice to all of the parties. Member Gomes asked if that meant the Commission would reconsider Long Beach's request for reconsideration. Member McInerney explained that the motion for reconsideration would be continued. Ms. Jorgensen explained that the request for reconsideration had already been denied because there were not five affirmative votes.

Member Sherwood thought the remaining question was whether the Commission wanted to go to the next step and hold a separate hearing to discuss the Santa Barbara claim, which would take a notice of hearing. Ms. Jorgensen agreed, adding that that would take two months. Member Sherwood clarified that the issue could be left in limbo until Santa Barbara comes forward. Ms. Jorgensen noted that if the Commission did move to dismiss, Santa Barbara could come forward and state the reasons why it should continue.

Member Beltrami requested the notice be to "dismiss" rather than to "discuss" the claim. The Chair agreed and directed staff to include the notice to dismiss in its next notice. Member McInerney clarified that, if the motion to dismiss ends in a tie vote, the Santa Barbara claim would be resuscitated. This would put the Commission exactly where it would have been if it approved the motion for reconsideration today.

VII. INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

A. ADOPTION OF PROPOSED PARAMETERS AND GUIDELINES

Item 8 *Criminal Background Checks, (a.k.a. Michelle Montoya School Safety Act)*
CSM-97-TC-16
Lake Tahoe Unified School District and Irvine Unified School District, Co-Claimants
Education Code Sections 44237, 45125, 45125.1, 44332.6, 44830.1, and 45122.1
Statutes of 1997, Chapters 588 and 589

This item was continued the request of the Commission staff and the Department of Finance staff. Ms. Higashi noted that a prehearing conference was held and staff hopes to set the item for the next hearing.

Item 9 *Pupil Residency Verification and Appeals* – CSM-96-348-01
Sweetwater Union High School District and
South Bay Union School District, Co-Claimants
Education Code Sections 14502, 48204.5, and 48204.6
Revenue and Taxation Code Section 97.3
Specified Executive Orders, Standards, and Procedures
Statutes of 1984, Chapter 268
Statutes of 1995, Chapter 309

This item was adopted on consent.

B. REQUESTS TO AMEND PARAMETERS AND GUIDELINES

Item 10 *Mandate Reimbursement Process – Amendment*
CSM-4485-PGA-98-01
Statutes of 1975, Chapter 486
Statutes of 1984, Chapter 1459
Statutes of 1995, Chapter 303 (Budget Act of 1995)
Statutes of 1996, Chapter 162 (Budget Act of 1996)
Statutes of 1997, Chapter 282 (Budget Act of 1997)
Statutes of 1998, Chapter 324 (Budget Act of 1998)
Statutes of 1999, Chapter 50 (Budget Act of 1999)

This item was adopted on consent.

Item 11 *Juvenile Court Notices II* – CSM-98-4475-PGA-1
Sweetwater Union High School District, Claimant
Statutes of 1995, Chapter 71

This item was adopted on consent.

C. ADOPTION OF PROPOSED REGULATORY ACTION

Item 12 Proposed Amendments to California Code of Regulations, Title 2 Chapter 2.5, Section 1182.and Section 1187.2 Quorum and Voting Requirements (Tie Vote).

Patricia Hart Jorgensen introduced this item. She noted that the Commission's current regulations require all Commission actions to be supported by a majority vote of the existing membership, but do not include procedures for resolution of a tie vote. At its June 24, 1999, hearing, the Commission initiated a new rulemaking package to amend sections 1183 and 1187.2 to establish procedures for tie votes. This proposal provides the Commission with the following options:

- Rehear the claim when membership changes or after an abstaining member has the opportunity to review the administrative record;
- Assign the claim to a hearing panel or hearing officer for hearing and preparation of a proposed decision for the Commission's consideration (in the case of a hearing panel, members shall be chosen by lot); or
- Direct staff to prepare a proposed decision based upon its final analysis and the evidentiary hearing for the Commission's consideration.

Ms. Jorgensen explained that the 45-day public comment period closed August 27. The Commission received comments from Long Beach and San Diego Unified School Districts. Both districts recommended an amendment to the Commission's regulations providing that a tie vote

results in denial of the claim or reaches a finding that the claimant has exhausted its administrative remedies. Ms. Jorgensen submitted that to adopt this proposal would deprive the reviewing court of the tools necessary to perform its review—it would ultimately force the reviewing court to remand the matter back to the Commission for a final decision supported by adequate findings. She said this has already happened, as evidenced in the unpublished decision in the Sacramento Superior Court in the matter of *Santa Barbara County Superintendent of Schools* v. *State Board of Control.* Ms. Jorgensen agreed with the commentators that these regulations will not cure a tie vote, but added that they do establish procedures for the Commission to follow. Staff recommended adoption of this rulemaking package.

Joseph Mullender, with the Long Beach Unified School District, noted his preference for adoption of a regulation deeming a tie vote a denial. He cited *REA Enterprises* (52 Cal.App. 3d 596), a Coastal Commission case, in which the court upheld the Commission's denial of a permit based on a tie vote. Ms. Jorgensen noted that Public Resources Code section 27400 requires that, for a permit to go forward, there must be an approval. Further, she distinguished that the Coastal Commission acts similar to a court of appellate review, not as a de novo court.

Mr. Mullender submitted that, if the Commission has a denial by tie vote, it should make the finding in support of the denial just as it does with a majority denial.

Ms. Shelton explained that the Commission cannot have findings in a tie vote situation because there isn't agreement among the Commission members as to what those findings are. This is especially important in cases with factual issues.

Jim Cunningham, with the San Diego Unified School District, submitted that a tie vote is not necessarily a decision on the merits, but it has a functional equivalent of a denial. He supported the Long Beach position. Mr. Cunningham did not believe any of staff's alternatives would work, and instead suggested that the Commission find that its decision is that it cannot make a decision and allow the claimant to go to court, or deem the claimant to have exhausted its administrative remedies. Then, the Commission could adopt parameters and guidelines in accordance with the findings of the court.

Member Beltrami asked Mr. Cunningham if he felt it was a problem that there would be no record that goes to the court. Mr. Cunningham responded that, despite the fact that a record would not be necessary for a de novo review, an extensive record is available.

Member Gomes asked if Mr. Cunningham's concerns about findings reconcile with the *Topanga* case, regarding a final determination on the merits.

Ms. Jorgensen replied that, based on the statutory scheme established by the Legislature under which the Commission must operate, there must be a decision with findings. In response to the Chair, Ms. Jorgensen said that a tie vote denial without findings would leave the Commission right back where it started.

Mr. Cunningham agreed that it would not be reviewable under the standard in section 1094.5, but noted there are other forms of action without those limitations. Mr. Mullender added that the Commission could also have oral findings.

Member Steinmeier commented that the Commission's only tool is to use regulations to solve this problem. She supported staff's recommendation because, in a past claim, turning the matter over to an administrative law judge was successful. If this does not work, then the Legislature will have to resolve the problem.

Member McInerney stated that the Commission could not accomplish much with the proposed regulations. He submitted that the problem is political and legal. A judge is looking for findings—no matter how the Commission defines a tie vote, it will not be providing findings. Member McInerney suggested that the only real option would be to cast a straw vote and abstain on findings to create a denial, thereby allowing the claimant to go to court. However, this would give the other side the advantage of the substantial evidence test. Ms. Jorgensen responded that a straw vote with no findings would not work.

Member Beltrami asked about the Coastal Commission code. Ms. Jorgensen replied that there is a state law indicating that the permit needs a majority vote for approval. Further, the Commission has original jurisdiction, not de novo.

Member Beltrami agreed with Member McInerney that the proposal simply postpones the problem. He sympathized with the claimants' plight. Ms. Jorgensen agreed that the proposal does not force resolution, rather, it establishes procedures for the Commissioners to consider in the event of a tie vote. Member Beltrami preferred to modify the regulations to provide that everything goes to a hearing officer. He did not like the option of the staff report superceding the Commission.

Ms. Higashi clarified that (c)(3) directs staff to prepare a proposed statement of decision based upon the final staff analysis and evidentiary hearing, it does not imply that the proposal becomes the decision without a vote. Member Beltrami asked if that was almost a rehearing. Ms. Higashi replied that it could be viewed that way. Member Beltrami agreed with Member McInerney that the problem was political and may have to be answered through the Legislature.

Member Sherwood asked what would happen if claimants accepted a tie vote as a denial and allowed them to take their chances at the court level. Ms. Jorgensen estimated that there is a 99 percent chance that the court would send the issue back to the Commission to make a decision with findings. She cited the *Santa Barbara* case (which was not a tie vote issue) in which the reviewing court remanded the issue to the Commission to come up with more specific findings in support of its decision.

Mr. Cunningham rebutted that, in the *County of San Diego* case, the court did not send the matter back for findings. He submitted that the test claim issue was decided by the courts and sent back to the Commission to adopt the parameters and guidelines. Ms. Shelton explained that that case was not a test claim and applied only to one county. Further, it did come back to the Commission to determine whether or not any costs were mandated by the state. Ms. Shelton added that the SIDS test claim was remanded because the Commission did not have any findings on the fee authority.

Member Gomes moved to adopt staff's recommendation. With a second by Member Steinmeier, the motion passed unanimously.

VIII. EXECUTIVE DIRECTOR'S REPORT

Item 13 Legislation, Workload, and October Agendas

Ms. Higashi noted that the report was included in the binders. She noted that:

The Commission's claims bill and CSAC's legislation, the Local Government Omnibus Act of 1999, are on the governor's desk.

The Commission's pending regulations (regarding the Conflict of Interest Code and AB 1963 and Sunset Review packages) were filed with the Secretary of State for printing.

Three new test claims and four incorrect reduction claims have been filed with the Commission.

The SB 1933 hearing in Butte County will be held on October 19. Staff is working with Department of Finance to prepare a staff report on this application.

The regular Commission hearing on October 28 will include the preliminary decision on the Butte County application, as well as a continuation of the *Special Education* Parameters and Guidelines The School Site Councils and Brown Act test claims are tentatively set for hearing, along with the item continued from this month.

Member Beltrami recognized that today was Member McInerney's last Commission hearing. The Chair added that he would be missed.

IX. PUBLIC COMMENT

None.

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action) (tentative)

The proposed parameters and guidelines for *Special Education*, CSM-3986, were not heard.

ADJOURNMENT

Hearing no further business, Chairperson Porini adjourned the meeting at 12:31 p.m.

Paula Higashi

PAULA HIGASHI
Executive Director

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